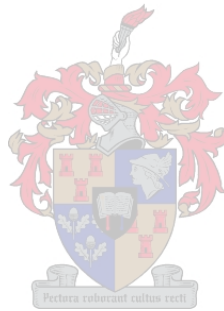


The Constitutional Property Clause and Immaterial Property Interests

Mikhalien Kellerman



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Promoter: Prof AJ van der Walt

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

The question that this dissertation addresses is which immaterial property interests may be recognised and protected under the constitutional property clause and if so, under which circumstances. The question originated in the *First Certification* case,¹ where the court held that the constitutional property clause is wide enough to include property interests that require protection according to international norms. The traditional immaterial property interests or intellectual property rights (patents, copyright, designs and trademarks) are protected as property in private law on a *sui generis* basis. Since it is generally accepted that the property concept in constitutional law includes at least property rights protected in private law, it is relatively unproblematic to include intellectual property rights under the constitutional property clause. In *Laugh It Off v SAB International*,² the Constitutional Court explicitly balanced the right to a trademark with the right to freedom of expression, which is accepted as authority that at least trademarks may be recognised and protected as constitutional property. The other intellectual property rights may most likely be recognised and protected by analogy. Foreign law as well as international law also indicates that intellectual property should be recognised and protected as constitutional property. However, there are other, unconventional immaterial property interests that are not protected as property in private law. Some are protected in private law, but not as property; others originate in public law; and yet others are not protected yet at all. In terms of the Constitution, South African courts may consider foreign law, but must consider international law. This dissertation determines when these interests may be protected as constitutional property by reference to foreign cases from German, American, Australian and Irish law; regional international law, namely European Union cases; and international law. The conclusion is that unconventional immaterial property interests may generally be protected if they are vested and acquired in terms of normal law, have patrimonial value and serve the general purpose of constitutional property protection. Property theories are also useful to determine when immaterial property interests deserve constitutional protection, although other theories may be more useful for some of the unconventional interests. The German scaling approach and the balancing of competing interests is a useful approach for South African courts to help determine the appropriate level of protection for specific immaterial property interests without excluding some at the outset.

¹ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).

² 2006 (1) SA 144 (CC).

Opsomming

Die vraag waarmee hierdie verhandeling handel is of belange in immateriële goedere erken en beskerm kan word in terme van die grondwetlike eiendomsklousule en indien wel, onder watter omstandighede. Die vraag het sy ontstaan in die *First Certification* saak,³ waar die Grondwetlike Hof beslis het dat die eiendomsklousule se omvang wyd genoeg is om belange in eiendom in te sluit wat volgens internasionale norme beskerming verg. Sekere regte in immateriële goedere word op 'n *sui generis* basis in die privaatreë beskerm, naamlik die regte in tradisionele immaterieelgoederereg kategorieë of intellektuele eiendom (patente, kopiereg, ontwerpe en handelsmerke). Dit is 'n algemene beginsel van grondwetlike eiendomsreg dat die konsep van eiendom minstens belange insluit wat as eiendom in die privaatreë beskerm word. In *Laugh It Off v SAB International*⁴ het die Grondwetlike Hof 'n handelsmerkreg opgeweeg teen die reg op vryheid van uitdrukking en hierdeur implisiet erken dat minstens handelsmerke en dalk ook ander intellektuele eiendomsregte deur die eiendomsklousule erken en beskerm kan word. Buitelandse reg sowel as internasionale reg dui aan dat intellektuele eiendom grondwetlike beskerming behoort te ontvang. Buiten hierdie belange is daar ook immaterieelgoederereg belange wat nie onder eiendomsreg beskerm word in die privaatreë nie. Sommige van hierdie belange word wel in die privaatreë beskerm, maar dan onder ander areas van die reg as eiendom; ander het hul oorsprong in die publiekreg; en die res word tans glad nie beskerm nie. Die Grondwet bepaal dat hoewel buitelandse reg in ag kan neem en dat hulle internasionale reg moet oorweeg. Die verhandeling se vraag word beantwoord met verwysing na sake uit die Duitse, Amerikaanse, Australiese en Ierse grondwetlike reg; streeks-internasionale reg van die Europese Unie; en internasionale reg. Die onkonvensionele immaterieelgoederereg belange kan oor die algemeen beskerm word as eiendom indien daar 'n gevestigde reg is, die reg in terme van gewone reg verkry is en die belang die algemene oogmerke van die grondwetlike klousule bevorder. Die teorieë oor die beskerming van eiendom is van nut om te bepaal watter belange beskerm kan word, alhoewel sekere onkonvensionele belange beter geregverdig kan word deur ander tipes teorieë. Die Duitse metode om belange op te weeg kan van besondere nut wees vir Suid-Afrikaanse hoewel om te bepaal watter vlak van beskerming spesifieke belange in immaterieelgoedere behoort te geniet.

³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).

⁴ 2006 (1) SA 144 (CC).

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Chapter 1: Introduction

1.1 The Research Question, Methodology and Hypothesis

In an important recent case, South African Breweries (SAB) had a registered trademark for the words ‘Carling Black Label’ and for a representation of the label of its product. The respondent, Laugh It Off Promotions CC (Laugh It Off), sold T-shirts with the slogan ‘Black Labour, White Guilt.’ They replaced the laudatory part ‘America's lusty, lively beer’ and ‘Brewed in South Africa’ with ‘Africa's lusty, lively exploitation since 1652’ and ‘No regard given worldwide’.⁵ SAB argued that this negative connotation with their product caused damage to their property and business reputation. Laugh It Off, on the other hand, argued that they are allowed to parody a trademark in terms of the right to freedom of expression. In South African law, this is the first and to date only example of a conflict between an intellectual property right (in this case a trademark) and another fundamental right (freedom of expression).⁶ However, as will be demonstrated in this dissertation, there are many other traditional immaterial property interests and other unconventional immaterial property

⁵ *South African Breweries International (Finance) BV t/a Sabmark International v Laugh It Off Promotions CC* [2003] 2 All SA 454 (C), *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) and *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

⁶ This has to be qualified with reference to a conflict which arose between patent rights and the right to healthcare following the introduction of section 15C of the Medicines and Related Substances Act 101 of 1965. The Pharmaceutical Manufacturers’ Association of South Africa and Others brought a case in the Transvaal High Court against the President of the Republic of South Africa, but this was later settled out of court. See *Pharmaceutical Manufacturers’ Association and Others v The President of the Republic of South Africa and Others (Treatment Action Campaign as amicus curiae)* case no 4183/98 [1998] (T); case settled out of court, heads of argument available at <http://www.cptech.org/ip/health/sa/pharmasuit.html> (accessed 9 February 2011). Although the heads of argument set out the interaction between the economic implications of patents and healthcare on the one hand; and access to affordable medicine and the right to health on the other, the court did not pronounce on these issues and as such this particular example is of limited value for purposes of finding general guidelines that may be of value to South African courts which have to consider the interaction between fundamental rights and immaterial property interests. Section 15C of the Medicines and Related Substances Act 101 of 1965 which was inserted by section 10 of the Amendment Act 90 of 1997 states as follows:

‘Measures to ensure supply of more affordable medicines. - The Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public, and in particular may -

(a) notwithstanding anything to the contrary contained in the Patents Act, 1978 (Act No. 57 of 1978), determine that the rights with regard to any medicine under a patent granted in the Republic shall not extend to acts in respect of such medicine which has been put onto the market by the owner of the medicine, or with his or her consent;

(b) prescribe the conditions on which any medicine which is identical in composition, meets the same quality standard and is intended to have the same proprietary name as that of another medicine already registered in the Republic, but which is imported by a person other than the person who is the holder of the registration certificate of the medicine already registered and which originates from any site of manufacture of the original manufacturer as approved by the council in the prescribed manner, may be imported;

(c) prescribe the registration procedure for, as well as the use of, the medicine referred to in paragraph (b).’

Also see page 71, 289-292 and 380-382 of this thesis.

interests that may require constitutional property protection in instances where the property interest comes into conflict with the right of a third party and where the state regulates property. The focus of this thesis is to consider whether and if so when, certain immaterial property interests are (or should be) recognised as property for purposes of section 25. Naturally, once these interests are recognised and protected as property they will inevitably in some instances come into conflict with other constitutional rights, making it necessary for the courts to balance the conflicting rights. However, this balancing exercise is conceptually distinct from the question whether the interests should be protected as property. To confuse the two issues (for example by considering the conflicts and balancing as a prerequisite for recognition) would confuse or collapse the two stages of constitutional analysis as adopted by the Constitutional Court.⁷

The research question of this dissertation, simply stated, is whether immaterial property interests may be recognised and protected as property for purposes of the constitutional property clause and if so, under which circumstances. The reason for this problem is that there is no definition of the property concept in the constitutional property clause and that South African courts have not yet given clarity as to which immaterial property interests may be recognised and protected or what the extent of such protection could be. In the *First Certification* case,⁸ where the Constitutional Court was required to certify whether the Constitution complies with the 34 Constitutional Principles,⁹ the Court held that there is no universally accepted norm that requires protection of intellectual property under a separate constitutional right. The Constitutional Court decided that section 25 (the constitutional property clause) complies with international human rights standards. The Court found that the property concept is wide enough to include rights and interests that require protection according to international human rights standards. Therefore, certain immaterial property interests may still be included under the property clause although it has not been clarified by case law yet which specific interests may be included. Based on this argument, the hypothesis for this dissertation is that the mere fact that immaterial property interests are not explicitly mentioned in the Constitution of the Republic of South Africa 1996 does not mean that these interests are not protected. Immaterial property interests may still enjoy protection, but it

⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 58-60. See Van der Walt AJ *Constitutional Property Law* (2005) 53-54. Also see page 71, 289-292 and 380-382 of this thesis.

⁸ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

⁹ Constitution of the Republic of South Africa 200 of 1993.

remains to be determined which specific immaterial property interests may be recognised and protected and under which requirements. It is necessary to find the approach that would be in line with international human rights standards. The object of this study is to determine whether there is a basis for the inclusion of immaterial property interests under the constitutional property clause and under which specific circumstances a particular interest may be recognised and protected, at least in principle.

The nature of traditional as well as unconventional immaterial property interests is analysed and discussed in order to determine which of these interests may be recognised and protected as constitutional property. The immaterial property interests include traditional immaterial property interests or the so-called intellectual property rights, namely patents, copyright, designs and trademarks.¹⁰ However, the unconventional immaterial property interests in commercial information, confidential information, trade secrets, digital copyright, biotechnological products, traditional knowledge, commercial property, participatory claims and non-proprietary rights are also considered.

It is necessary to distinguish between the traditional immaterial property interests or intellectual property interests on the one hand; and unconventional immaterial property interests which also include categories of property interests that cannot be characterised as intellectual property, such as non-proprietary rights, on the other. Both of these categories are included under the overarching category of immaterial property. However, it was necessary to categorise the two different kinds of immaterial property separately, since the one group of immaterial property interests consists of intellectual property rights that are recognised and protected as property in private law; and the other group of those immaterial property interests that are either not protected as property in private law yet or consist of certain interests that are not yet protected adequately as property in private law. Although some of the unconventional immaterial property interests may enjoy some protection in private law, some even under existing intellectual property statutes, there are still some aspects that do not enjoy adequate protection and in this sense that they are not generally protected at all or not sufficiently, they may be described as unconventional. The intellectual property rights may be described as traditional in the sense that they are generally protected as property in private law, albeit on a *sui generis* basis. The use of the term traditional is also informed by and

¹⁰ It would also be possible to divide the categories into two broad categories, namely copyright and related rights (notably performers' rights) and industrial

refers to private-law property tradition, as opposed to constitutional property innovation which also includes unconventional property interests.

It is necessary to include all of the immaterial property categories referred to under the overarching umbrella of interests. The reference to interests has the purpose of providing an overarching category for all the property interests referred to. However, only the interests that are also protected as property in private law are referred to as property rights. The other interests are only described as immaterial property interests, since they are not protected as property in private law and therefore cannot be described as immaterial property rights. They may however be protected as rights in other areas of private law or public law, for example contractual rights. The reason why reference is made to property interests at all, is because the constitutional property concept is wider than the private property concept and property interests that share certain characteristics with private property rights may also be protected as constitutional property.

The traditional immaterial property categories are less problematic to recognise and protect under the constitutional property clause. The reason for this is that intellectual property rights are afforded property rule-type protection by legislation and private law honours this position, therefore intellectual property rights are recognised as *sui generis* categories of property in private law. In constitutional property law it is generally accepted that at least interests recognised and protected as property in private law would also be recognised and protected as property in constitutional law, although the constitutional property concept is wider than in private law and interests other than property rights in private law may be recognised and protected as constitutional property as well. For the unconventional categories of immaterial property, the reasons why they could be protected as property in constitutional law differ from the reasons why intellectual property may be included under the constitutional property concept.

Some of the unconventional immaterial property interests are protected in private law under an area of law other than property; or in public law. There is usually no constitutional clause other than the property clause that could possibly provide protection to these interests and because these interests share certain characteristics with property and intellectual property, they may be recognised and protected under the constitutional property clause. Other immaterial property interests receive no protection in any area of law and therefore in

addition to the question whether they may be recognised and protected as property in constitutional law, it also needs to be determined whether these interests require some form of private law protection. These interests are most notably the interests in traditional knowledge. Yet other interests already receive adequate protection under other areas of constitutional law. Participatory claims already receive explicit protection under socio-economic rights and constitutional property protection is therefore unnecessary although possible in principle.

Since there are not many constitutional cases in South African law that deal with the constitutional aspects of immaterial property interests, it is necessary to seek some guidance from foreign law and international law. A comparative law methodology is followed, accordingly the constitutions and case law from different jurisdictions are analysed and discussed. An analysis of literature is conducted in order to find the most suitable approach for South Africa. The focus of this comparative study falls specifically on constitutions, cases and international law instruments that may provide South African courts with specific guidance regarding the recognition and protection of immaterial property interests as constitutional property. This is done by means of an examination and comparison of case law and constitutions regarding immaterial property law and constitutional property law in the respective legal systems.

Section 39(1) (c) states that a court, tribunal or forum may consider foreign law when interpreting the constitution. This necessitates a comparative study of the South African, German, American, Australian and Irish legal systems regarding their respective approaches to the inclusion of immaterial property interests as fundamental rights. The reason why these foreign legal systems were chosen above others is because there are specific court cases that recognise and protect some immaterial property interests as property and give reasons why particular interests may be included under the property concept and yet others excluded. These general guidelines may be of particular value to South African courts in deciding cases where a particular immaterial property interest comes into conflict with another right or is regulated, cancelled, amended or expropriated.

The German Federal Constitutional Court has explicitly accepted the intellectual property rights in patents, copyright and trademarks as property for purposes of Article 14 of the Basic Law of the Federal Republic of Germany 1949. Furthermore, the German cases give

particularly useful recommendations pertaining to some of the unconventional immaterial property interests, most notably state-granted licenses permits and quotas; and participatory claims. American constitutional law protects patents and copyright separately from other property interest under the Intellectual Property Clause¹¹ and most notably the so-called ‘new property’ interests have received attention. Australian constitutional law has provided valuable guidelines pertaining to the treatment of confidential information in constitutional law and some other unconventional immaterial property interests. Irish constitutional law gives guidelines pertaining to the treatment of state regulations of property and most notably, copyright has been recognised and protected as constitutional property and this is accepted as authority that other intangible rights may be included under the constitutional property concept as well. Furthermore, Irish constitutional law accepts that certain commercial property interests and participatory claims may be recognised and protected as property.

Human rights instruments under international law are also analysed and discussed in order to find the most suitable approach for South African courts in dealing with the constitutional protection of immaterial property interests. According to section 39(1) (b) of the Constitution, a court or tribunal is *obligated* to consider international law when interpreting the Bill of Rights. This is stronger than section 39(1) (c), which merely states that courts *may* consider foreign law. The Universal Declaration of Human Rights (UDHR)¹² protects both the right to property and the right to intellectual property. However, only the right to intellectual property was subsequently made a binding international human right in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³ The right to property was not included in the ICESCR or the International Covenant on Civil and Political Rights (ICCPR).¹⁴ Therefore the focus of the international law section falls on the protection of intellectual property rights, since there are no binding instruments that protect the right to property generally. There are developments in international law scholarship to create a human rights framework for intellectual property which would provide specific guidelines to national courts regarding the level of protection that intellectual property rights should receive. Only European Union law, which forms part of regional international law, gives some guidance with regard to the

¹¹ Article I Section 8 Clause 8 of the Constitution of the United States of America 1787.

¹² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

¹⁴ United Nations *International Covenant on Civil and Political Rights* (Dec 16, 1966) 999 UNTS 171 (1976), entered into force Mar 23, 1976 (<http://www2.ohchr.org/english/law/ccpr.htm> (accessed 17 September 2009)).

treatment of property as a fundamental right; and hence the treatment of immaterial property rights that do not fall under one of the intellectual property categories. However, the status of European law is the same as foreign law and it can hence merely serve as persuasive authority in South African courts.

The question why immaterial property interests should be protected at all is also important in determining whether immaterial property interests should enjoy constitutional property protection. The classical theories as well as more recent theories are analysed and discussed to determine which may be utilised to justify the private law protection of immaterial property interests. The labour theory, reward theory, incentive theory, spiritual theories, economic theory, theory of natural monopoly and considerations of the public domain are considered. These theories may serve to justify the protection of immaterial property interests in private law, but they do not provide equally strong justification for the protection of all the interests. The traditional immaterial property interests may more readily be justified in terms of these theories than unconventional immaterial property interests. For some of the unconventional immaterial property interests there may be other theories that provide more insights, but this is outside of the scope of this dissertation. For example, the protection of traditional knowledge may be better justified by theories of distributive justice and socio-economic rights such as participatory claims may be supported by yet other theories. The property theories considered also only serve to justify the private law protection of immaterial property and there are other theories for the justification of constitutional property protection.¹⁵

It should be possible to include at least some immaterial property interests under the constitutional property clause, but the question remains which interests should be included and on what grounds and this question is addressed in the following chapters.

1 2 Motivation

Chapter 2 (Traditional Immaterial Property Interests) discusses the traditional immaterial property interests that are generally accepted as property in private law. These interests are patents, copyright, designs and trademarks; in other words the immaterial property interests that may also be categorised as intellectual property rights. Consequently the terms traditional

¹⁵ See Alexander GS *The Global Debate over Constitutional Property* (2006) in general.

immaterial property and intellectual property rights may be used interchangeably. Dean defines intellectual property as follows:

‘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 trademarks or under the common law remedy of passing off ... Intellectual property is a form of incorporeal property and by its intangible nature has little in common with corporeal property.’¹⁶

Alberts states that ‘[t]he nature of intellectual property is best understood through a comparison with other, tangible forms of property’.¹⁷ Unlike tangible property, intellectual property is not destroyed if the physical property is destroyed. He gives the example of a patent for binoculars. The patent (which is the property) is not destroyed if the pair of binoculars is destroyed. ‘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.’¹⁸ This entails the private law property rule-type protection of property. Since these traditional immaterial property interests or intellectual property rights are granted property rule-type protection in terms of the intellectual property legislation (Copyright Act 98 of 1978, Patents Act 57 of 1978, Designs Act 195 of 1993 and Trade Marks Act 194 of 1993) and private law honours this position, the intellectual property categories are viewed as *sui generis* categories of property in private law. Constitutional property law generally accepts that at least property interests recognised as property in private law would also be recognised and protected as property in constitutional law. Once the requirements in terms of legislation are met and the particular intellectual property right receives private law protection, then it would also be protected as property in constitutional law, at least in principle.

There also exist other new immaterial property interests that are not generally accepted as property in private law. These interests are discussed in Chapter 3 (Unconventional Immaterial Property Interests). These unconventional interests are commercial information, confidential information, trade secrets, digital copyright, biotechnological products,

¹⁶ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 105.

¹⁷ Alberts W ‘What is intellectual property’ (2007) *Nov De Rebus* 45-46 at 45.

¹⁸ Alberts W ‘What is intellectual property’ (2007) *Nov De Rebus* 45-46 at 45.

traditional knowledge, commercial property, participatory claims and non-proprietary rights.¹⁹ The reasons why these interests may be recognised and protected under the constitutional property clause differ from the reason why property interests protected as property in private law may be recognised. The unconventional immaterial property rights share certain characteristics with property and intellectual property and hence it is desirable to include them under the constitutional property concept. The characteristics are that the interest must have economic value and must have vested in terms of normal law. Furthermore, there is also no other constitutional clause other than the property clause that could possibly provide protection to these interests.

Some of these interests are protected in private law under areas other than property law or in public law. Others receive no protection in private law and in these cases an additional question must be asked, namely whether private law protection is necessary and whether the protection should entail property rule-type protection. In these cases, the potential constitutional property protection of these interests may be used to argue that the legislature should also provide private law protection for these interests. Notably, traditional knowledge receives no private law protection and this is particularly problematic since third parties are appropriating the knowledge and subsequently using it to derive intellectual property products. Although the South African legislature is in the process of creating legislation to provide property protection to these interests in private law, there are many concerns that the current Traditional Knowledge Bill²⁰ would not provide adequate protection.

Since it is inevitable that the question why immaterial property interests should be protected at all would arise at some point, Chapter 4 (The Value of Immaterial Property) discusses the reasons why immaterial property interests should be protected as property, both in private law and constitutional law. The labour theory, reward theory, incentive theory, economic theory, theory of natural monopoly and considerations of the commons are discussed. The classical property theories may justify the intellectual property categories with some success even though certain criticisms are levelled against the application of these theories to intellectual property. However, it is more difficult to justify some of the unconventional immaterial property interests in terms of the classical property theories. For the categories of immaterial

¹⁹ *Ciro T 'The scarcity of intellectual property' (2005) 1 JILT 1-21 at 7.* Domain names, plant breeders' rights, geographical indications and virtual property may be added to this list.

²⁰ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

property interests that are already protected, but not as property in private law, it is not really useful to consider justification in terms of property theories. In other cases there may be other theories for justification of the immaterial property interests. Considerations of the commons are of particular importance to ensure that intellectual property rights and other immaterial property interests are not expanded to the detriment of the commons or public domain.

Chapter 5 (Immaterial Property Interests in the Constitution) discusses the South African constitutional property clause and cases and materials that could give some clarity as to which immaterial property interests may be recognised and protected as constitutional property. The difference between private law and constitutional law protection must be distinguished carefully since the two have widely differing purposes. Unlike the property rule-type protection of private law that protects against infringements by third parties, constitutional protection ensures that the state does not interfere with property unduly. The constitutional property clause provides strict requirements that the state must meet in order for a deprivation or expropriation of property to be constitutionally valid. The constitutional property clause may also provide protection where the property right comes into conflict with other constitutional or private rights of other persons, at least in principle. If another right is regarded as more valuable than the particular property right, the other fundamental right may still outweigh the property right and consequently be protected more stringently than the property right.

In the *First Certification* case,²¹ the Constitutional Court responded to an objection that the constitutional property clause fails to recognise the right to intellectual property. In the objection it was proposed that the intellectual property right advocated is a ‘universally accepted fundamental right, freedom and civil liberty’. The Court held that ‘[a]lthough it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies’. The Court apparently interpreted this tendency to mean that it is not a universally accepted norm to include a specific right to intellectual property in a separate constitutional clause. The Court concluded that the term ‘property’ is wide enough to include rights and interests that need to be protected according to international human rights standards.

²¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

Dean²² examines the decision of the Court in the *First Certification* case and argues that there are general reasons for the recognition of intellectual property in the Constitution, but also that intellectual property rights are universally accepted as fundamental rights. He argued that the constitutional property clause does not provide adequate protection to intellectual property since it is created by legislation. These arguments are addressed in Chapter 5 (Immaterial Property Interests in the Constitution).

In the case of *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)*²³ a trade mark right was balanced against and trumped by the constitutionally protected right to freedom of expression. This is the first case in South Africa to deal with the constitutional protection of an intellectual property right, albeit implicitly. Smith²⁴ examines this judgment and concludes that ‘a South African trade mark must be seen as property that the owner may seek to protect like other property ... The issue is whether or not the prejudice to the trade mark outweighs the freedom of expression’.²⁵ Dean²⁶ also argues that the Constitutional Court departed from the point that intellectual property rights and the right to freedom of expression have equal status, despite the fact that intellectual property rights are not explicitly mentioned in the Bill of Rights. This interaction between immaterial property interests and other constitutionally guaranteed rights must also be discussed. It is generally accepted that this case implicitly recognises trademarks as constitutional property. The implications of this case for other categories of intellectual property are also discussed in this chapter.

Section 39(1) (c) of the Constitution²⁷ states that a court, tribunal or forum may consider foreign law, consequently a thorough comparative analysis is needed that examines the inclusion or exclusion of immaterial property interests as constitutional property in other legal systems. The constitutional protection of immaterial property interests as property in Germany, The United States of America, Australia and Ireland is examined in order to find the best approach for South Africa. These jurisdictions were specifically selected because

²² Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105 at 106, 110.

²³ 2006 (1) SA 144 (CC).

²⁴ Smith A ‘Trade-mark dilution – You can’t laugh it off’ (2004) 12(4) *JBL* 196-200.

²⁵ Smith A ‘Trade-mark dilution – You can’t laugh it off’ (2004) 12(4) *JBL* 196-200 at 199.

²⁶ Dean OH ‘Trade-mark dilution laughed off’ (2005) Oct *De Rebus* 18-22 at 19.

²⁷ Constitution of the Republic of South Africa 1996.

there were cases decided about the constitutional property protection of immaterial property interests and some guidelines may be distilled from these cases. In German constitutional law certain ‘incorporeal interests are recognized as objects of property for purposes of the property clause: copyright, trademarks, workers’ rights, contractual claims, and certain participatory ‘new property’ or so-called public-law participation rights’.²⁸ It is necessary to establish which of these traditional and new immaterial property interests should be included as property under the constitutional property concept in South African law.

Chapter 6 (Immaterial Property Interests in International Law) discusses the protection that international law instruments provide to immaterial property interests. According to section 39(1) (b) of the Constitution, attention must be given to international law in interpreting the Bill of Rights. Dugard states that ‘[s]ection 35(1) [now section 39(1) (b)] strengthens the role of international law in the interpretive process as it obliges courts to apply international law where it is “applicable”’.²⁹ He also states that basically every right in the Bill of Rights has a counterpart in an international human rights convention and he mentions the example of the right to property, concluding that it is hence unlikely that situations would arise where public international law will not be applicable under section 39(1) (b). In interpreting the constitutional property clause to determine which immaterial property interests may be included, South African courts therefore have to refer to international conventions.

Property is not protected in any binding international law instrument. Therefore European Union law is the only international law that can give any guidance to South African courts regarding the constitutional protection of immaterial property interests that are not categories of intellectual property. However, European Union law is regional international law to which South Africa cannot be a member and therefore this law can only have persuasive authority as is the case with foreign law. International law protects intellectual property by way of exception in the ICESCR³⁰ and this convention and comments on the convention provide guidelines pertaining to the protection of intellectual property and methods to determine whether a particular state is providing adequate protection to intellectual property rights. This could be of use to South African courts when deciding if protection for a specific intellectual

²⁸ Van der Walt AJ *Constitutional Property Law* (2005) 83-84.

²⁹ Dugard J ‘The role of international law in the interpreting of the Bill of Rights’ (1994) 10 *SAJHR* 208-215 at 212.

³⁰ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

property right is justified in a particular instance and how strong the constitutional protection should be.

Chapter 7 (Conclusion) analyses all the different guidelines found in property theories, South African constitutional law, foreign constitutional law and international law in order to formulate a number of concrete suggestions that may guide South African courts in their task to determine which immaterial property interests may be recognised and protected under the constitutional property clause. This chapter has the purpose of determining exactly which specific interests may be included under the constitutional property concept and on what grounds such an inclusion would be justified.

Chapter 2: Traditional Immaterial Property Interests

2.1 Introduction: Traditional and Unconventional Immaterial Property Interests

The aim of this chapter is, first of all, to distinguish between traditional and unconventional immaterial property interests, secondly to define traditional immaterial property interests broadly and thirdly to discuss specific interests. Chapter 3 (Unconventional Immaterial Property Interests) discusses unconventional immaterial property interests. The traditional immaterial property interests are defined as patents, copyright, registered designs and trademarks, which are also the conventional categories of intellectual property. Consequently, the terms traditional immaterial property interests and intellectual property rights are used interchangeably. This chapter is not meant to constitute a full or authoritative review of intellectual property, but is merely meant to make the point that intellectual property rights already enjoy full recognition and protection in private law on a *sui generis* basis and that this basis alone justifies constitutional property protection. Such *sui generis* protection is generally afforded on the basis of legislation.

The reason for this enquiry is to establish whether there are immaterial property interests that might enjoy constitutional protection under the property clause.¹ The question originates from the *First Certification* case² where the Constitutional Court responded to an objection that the constitutional property clause³ failed to recognise the right to intellectual property. The objection advocated the view that the right to intellectual property was a ‘universally accepted fundamental right, freedom and civil liberty’.⁴ The court held that ‘[a]lthough it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies’.⁵ The court interpreted this tendency to mean that the inclusion of a specific right to intellectual property in a separate constitutional clause is not a universally accepted norm. This does not mean that the right to intellectual property is not protected at all; it merely means that the constitutional principles that governed the

¹ Sec 25 of the Constitution of the Republic of South Africa 1996.

² *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

³ Sec 25 of the Constitution of the Republic of South Africa 1996.

⁴ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

⁵ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

writing of the 1996 Constitution did not require a separate right pertaining to intellectual property.

Therefore it becomes apparent that intellectual property rights may be protected under the property clause⁶ even though there is no explicit right pertaining to intellectual property. Van der Walt⁷ states that the decision of the court in the *First Certification* case⁸ was correct in stating that it is unnecessary to include a separate right to intellectual property in the Bill of Rights.⁹ The first reason he furnishes is that there is no universally recognised norm that dictates the formulation of a constitutional property clause. This is particularly the case where the description of property is concerned. The second reason, which becomes apparent from comparative case law, is that the mere fact that a particular class of property is not mentioned explicitly does not automatically exclude that class of property from the protection of a property clause.¹⁰ In other words, intellectual property or traditional immaterial property interests may still be recognised and protected as property under the constitutional property clause even though it is not mentioned explicitly. Similarly, unconventional immaterial property interests could also be recognised and protected as constitutional property.

In the *First Certification* case¹¹ the court also held that there is no separate fundamental right for mineral rights. However, this is not authority for the suggestion that the category of mineral rights is not constitutional property. It merely means that, based on universally recognised practice, it is not the norm to protect mineral rights in a separate constitutional clause.¹² In *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*¹³ the court held that mineral rights are not protected by the constitutional property clause, because mineral rights are not mentioned explicitly in the Bill of Rights. This is

⁶ Sec 25 of the Constitution of the Republic of South Africa 1996.

⁷ Van der Walt AJ *Constitutional Property Law* (2005) 86.

⁸ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

⁹ See Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N *South African Constitutional Law – The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17. Roux agrees that intellectual property rights may still enjoy constitutional protection. See further Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 1-15. Also compare Dean OH 'The case for the recognition of intellectual property in the Bill of Rights' (1997) 60 *THRHR* 105-119 at 105.

¹⁰ Van der Walt AJ *Constitutional Property Law* (2005) 86. The aspect of comparative constitutional property law receives more attention in Chap 5 (Immaterial Property Interests in the Constitution).

¹¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 74.

¹² Van der Walt AJ *Constitutional Property Law* (2005) 86.

¹³ 2002 (1) BCLR 23 (T).

patently wrong. Van der Walt¹⁴ states that when a specific kind of property is not mentioned explicitly, it may be inferred that a property clause protects any class of property that is not specifically excluded. This is the case as long as the category of interests is recognised as property by the law. This is particularly so when the interests are recognised as property in private law.¹⁵

As far as immaterial property interests are concerned, there has not been specific case law yet that clarifies which interests may be included under the property clause. Therefore it still needs to be determined which specific immaterial property interests could be included for the purposes of constitutional protection. In order to assist in determining this issue, immaterial property interests may be divided into two broad categories. Firstly, there are the traditional forms of immaterial property interests that are generally accepted as property in private law; and secondly there are the new, unconventional forms of intellectual property interests that are not yet generally recognised as property in private law or that may be recognised in other areas of private law. This chapter outlines the position of the so-called traditional immaterial property interests or intellectual property rights (namely patents, copyright, registered designs and trademarks);¹⁶ while Chapter 3 deals with the unconventional immaterial property interests (for example trade secrets, traditional knowledge and biotechnological products). Traditional immaterial property interests or intellectual property rights are created by way of legislation. The legislation provides for property-based protection of the rights and for this reason intellectual property rights are accepted as property in private law albeit on a *sui generis* basis.

Immaterial property interests may furthermore be categorised with regard to their recognition as property in private law and in public law. The first category consists of the traditional immaterial property interests that are generally recognised as property in private law as well as in constitutional law. This is the case despite the fact that most of these interests are *sui*

¹⁴ Van der Walt AJ *Constitutional Property Law* (2005) 87.

¹⁵ Van der Walt AJ *Constitutional Property Law* (2005) 87.

¹⁶ Intellectual property rights may also be more broadly classified into two categories, namely copyright and related rights (notably performers' rights) on the one hand; and industrial property (patents, trade marks and industrial designs) on the other. However, for purposes of determining the constitutional protection of intellectual property, it was necessary to deal with each category separately. The reason for this is that when it comes to the chapters on theory, foreign law and international law, each intellectual property category has to be considered separately in light of the examples and guidelines that may be distilled from these areas of law.

generis forms of property.¹⁷ For example, the immaterial property interests in trademarks are governed by the Trade Marks Act 194 of 1993, similar to the way all the other traditional immaterial property interests are created and governed by separate acts of parliament. Some examples of interests of this nature that are already accepted as constitutional property in foreign law would be intellectual property such as patents, copyright and trademarks. To date these traditional immaterial property interests have not been explicitly recognised by the court as constitutional property, although it should be possible to include it, as is argued in Chapter 5 (Immaterial Property Interests in the Constitution).

The second category encompasses immaterial property interests that are not recognised as property in private law, but that may be recognised in constitutional property law. Van der Walt states that in German constitutional law, certain traditional as well as new incorporeal interests are acknowledged as objects of property for purposes of the property clause even though they are not recognised as property in private law. These interests are trademarks, copyright, workers' rights, contractual claims, and certain participatory 'new property' (also referred to as public-law participation rights).¹⁸ Commercial property such as debts, claims and goodwill of a business are other examples of immaterial property interests that may be recognised as property for constitutional purposes, but not necessarily as property in private law.¹⁹ Thirdly, there are immaterial property interests that are not yet clearly recognised as property in constitutional law (either in South African or foreign law) and probably not in private law either. Some of these unconventional interests include commercial information,

¹⁷ Although there are many examples of how such *sui generis* categories of property function, it is not the purpose of this chapter to discuss them exhaustively. This chapter departs from the position that intellectual property rights are property rights in private law and thereafter the focus falls on the more controversial question of constitutional property protection. However, an example of the functioning of intellectual property as property in private law may be found in the case of *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A) (reversing the decision of *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1991 (3) SA 240 (D)). In this decision, Corbett CJ stated that '[t]he assignment of the South African copyright in respect of the get-up of the tapes in issue vested in appellant exclusively all the rights comprehended by the South African copyright and divested TDK Electronics thereof'. This demonstrates how the assignment of copyright transfers ownership in the context of parallel imports. A further example may be the hypothecation and attachment of intellectual property. See sec 60 of the Patents Act 57 of 1978, sec 41 of the Trade Marks Act 194 of 1993 and sec 30 of the Designs Act 195 of 1993, which regulate such hypothecation and attachment for each of the relevant categories of intellectual property.

¹⁸ Van der Walt AJ *Constitutional Property Law* (2005) 83-84. See Chap 5 (Immaterial Property Interests in the Constitution) for a more detailed discussion.

¹⁹ This statement should be qualified, since certain of these interests enjoy strong protection under private law, albeit not necessarily in terms of property law, but by other areas of private law. For example, in German private law debts and claims are protected under private law, but not under property law, since the German Civil Code (*Bürgerliches Gesetzbuch – BGB § 903*) restricts property to corporeal objects for purposes of private law. Debts and claims are protected under the law of contract in private law. See Van der Walt AJ *Constitutional Property Law* (2005) 96. Also see Van der Walt AJ *Constitutional Property Clauses* (1999) 131.

trade secrets, government secrets, confidential information and digital copyright.²⁰ The so-called ‘new property’ or participatory rights might also fall into this category.²¹

A controversial area where immaterial property interests could enjoy constitutional recognition is cultural appropriation and other instances where immaterial property rights are based on or derived from existing knowledge without acknowledgement. This falls in the category of immaterial property rights that are hitherto not recognised in either private law or constitutional law. There is still some uncertainty whether these interests should be protected as property rights or rather as cultural rights or perhaps even as a combination of the two. Ghosh states that

‘[m]uch of the debate over traditional knowledge has focused on the consistency of using intellectual property, a tool of progress, to protect ancient and established knowledge. Proponents of using intellectual property to protect traditional knowledge fashion the law as a tool to promote the development and dissemination of knowledge systems that would otherwise be appropriated by powerful corporate interests’.²²

The arguments for and against this use of intellectual property both rely on conceptions of distributive justice, as Ghosh²³ argues.

It is necessary to establish which of these traditional and new immaterial property interests should be included as property under the constitutional property clause. As a point of departure, the focus of this chapter falls on traditional immaterial property interests, while unconventional immaterial property interests are discussed in Chapter 3 (Unconventional Immaterial Property Interests). A broad definition of traditional immaterial property interests is first examined, before the more specific interests in patents, copyright, registered designs and trademarks are discussed. It is necessary to determine, broadly as well as more specifically, which particular interests exist for each category. Furthermore, the exact scope

²⁰ Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 7.

²¹ The aforementioned interests and other unconventional immaterial property interests are discussed in Chap 3 (Unconventional Immaterial Property Interests). Some of these interests are protected as rights in a form other than property rights, for example secs 24 (environment), 26 (housing), 27 (health care, food, water and social security), 28 (rights of children), 29 (education), 30 (language and culture) and 31 (cultural, religious and linguistic communities) of the South African Constitution protect socio-economic rights. Interests such as welfare rights may fall under this category. See Van der Walt AJ *Constitutional Property Law* (2005) 105. Traditional knowledge could also possibly be protected under sec 31 (cultural, religious and linguistic communities), although this would not provide for monetary remuneration as property protection would.

²² Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 888.

²³ Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 889.

and meaning; and non-constitutional recognition and protection of these interests have to be determined before it can be decided whether the interests may be included under the constitutional property concept.

Unavoidably, the question why immaterial property interests should be protected at all; and if so under which particular circumstances; also needs to be addressed. This is briefly done in this chapter, but Chapter 4 (The Value of Immaterial Property) discusses and analysis this question in more detail. It is also necessary to distinguish between private law and constitutional law protection of property, since the two areas have widely differing purposes. Private law protection has the purpose of providing strong property-rule type protection for private rights against competing private parties. In constitutional law recognition and protection is to get protection for private interests against the state and against competing constitutional rights of other private parties. This is discussed in more detail in Chapter 5 (Immaterial Property Interests in the Constitution).

2 2 Defining Traditional Immaterial Property Interests

Traditional immaterial property interests are generally recognised and protected as property in private law, although it is usually contrasted with tangible property. Dean defines intellectual property as follows:

‘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 trademarks or under the common law remedy of passing off ... Intellectual property is a form of incorporeal property and by its intangible nature has little in common with corporeal property.’²⁴

Alberts²⁵ proposes that the nature of intellectual property can best be understood by comparing it to tangible property. He takes the example of things, such as a watch or a soccer ball, to clarify the difference between intellectual property and tangible property. With

²⁴ Dean OH ‘The case for the recognition of intellectual property in the Bill of Rights’ (1997) 60 *THRHR* 105-119 at 105.

²⁵ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45.

tangible property an owner has rights to the object itself, at least in the civil-law tradition.²⁶ This has the result that if the object is destroyed, the owner's rights will be infringed. This is not the position with intellectual property. Unlike tangible property, intellectual property is not destroyed if the physical property is destroyed. Alberts explains the position with reference to a patent for a pair of night vision binoculars. If the binoculars are destroyed, the intellectual property rights granted in terms of the patent would not be infringed. This is so because the patent rights protect the invention and not the physical binoculars. Intellectual property law regulates the creation and use of immaterial property and the enforcement of ensuing rights. He also explains that most intellectual property rights are created by statute and property-rule type protection is granted for a limited period of time, provided the requirements of the legislation are met.²⁷ Therefore, as far as recognition in private law is concerned, intellectual property is still seen as *sui generis*.

May and Sell²⁸ also define intellectual property by comparing it to tangible property. Tangible property is a scarce resource that people need to compete for. According to May and Sell, intellectual property takes knowledge or information that is not formally scarce and constructs a scarce resource from that. The use of knowledge and information by different persons is not necessarily rivalrous, unlike the use of material things. Coincident usage therefore infrequently detracts from social utility where information is concerned. Where a material resource is concerned, two prospective users must compete for the resource. Markets and the setting of a price might mediate the competition. However, in the case of knowledge

²⁶ Even though it is now accepted that a right to property is in relation to the owner and third persons and not only between the owner and the object of the right, such a right would be infringed if the physical object of the right is destroyed. This would not be the case where an intellectual property owner is concerned, since the object of the right is not the physical object created in terms of the intellectual property right, but rather the right to create and distribute these objects.

²⁷ Alberts W 'What is intellectual property?' (2007) Nov *De Rebus* 45-46 at 45. Also see Wilson J 'Could there be a right to own intellectual property?' (2009) 28 *L & Phil* 393-427 at 394, where he argues that '[i]ntellectual property is philosophically interesting as it typically involves claims of private ownership of types, rather than (as in more familiar cases of ownership) tangible particulars. If I own a bag of rice, or a table, then my property right extends over only that particular bag of rice, or that particular table, but if I own the patent to a particular way of constructing a motor, then (whilst the patent lasts) I have a right which extends over all token motors of the type claimed in my patent. Similarly, copyright gives the novelist rights over that novel considered as a type, and it is in virtue of these legal rights that there are certain things that it would be illegal for you to do with your token copy of the novel (such as running off copies of it to give to all to your friends)'.

²⁸ May C & Sell SK *Intellectual Property Rights – A Critical History* (2006) 5. Also see Bainbridge DI *Intellectual Property* (1992) 10 and Alberts W 'What is intellectual property?' (2007) Nov *De Rebus* 45-46 at 45. Bainbridge and Alberts agree with May and Sell that intellectual property may be compared to tangible property in order to understand it.

or information, two different users may use the same knowledge without competing or the one detracting from the other's use.²⁹

According to Philips,³⁰ the question of what intellectual property is has two answers, the one colloquial and the other legal. He states that the colloquial depiction of intellectual property is that it basically consists of all the things that stem from activities of the human brain. He mentions examples such as ideas, inventions, poems, designs, microcomputers and Mickey Mouse.³¹ Philips explains that the legal account of intellectual property differs from the colloquial in that the focus falls upon the rights that are connected to the produce of the mind, rather than the product itself. He states that things such as a piece of land or a motor car are not called 'property' in legal terms because it is a physical thing. It is property because owners may enforce a right connected to it over some or all other persons. Phillips applies the meaning of the Latin word for property, namely *proprius* (one's own) to the concept of intellectual property, proposing that the concept of intellectual property means 'the legal rights which may be asserted in respect of the product of human intellect'.³² He gives the example of a record company's right to stop anyone from making a 'pirate' copy of a sound recording.³³

It becomes clear from this conception of intellectual property that the focus should be on the bundle of rights which is connected to the property, similar to the case of physical property. The bundle of rights approach entails that property is not defined with regard to the object, but the entitlements to use it.³⁴ This approach is suitable for tangible property as well as immaterial property. This approach is followed in American law and most of English law and may be contrasted with the object-related approach followed in civil law. The bundle of rights granted by intellectual property generally consists of negative rights that allow holders of the intellectual property to prohibit third parties from infringing their exclusive rights. This is the property protection granted by private law.

²⁹ May C & Sell SK *Intellectual Property Rights – A Critical History* (2006) 5.

³⁰ Philips J *Introduction to Intellectual Property* (1986) 3-4.

³¹ Philips J *Introduction to Intellectual Property* (1986) 3. Also see Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 9-14 for a broad overview of intellectual property.

³² Philips J *Introduction to Intellectual Property* (1986) 3-4.

³³ Philips J *Introduction to Intellectual Property* (1986) 3-4.

³⁴ See Hohfeld W 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale LJ* 16-59 and Hohfeld W 'Fundamental legal conceptions as applied in judicial reasoning' (1916) 26 *Yale LJ* 710-770.

Cornish³⁵ also defines intellectual property by reference to the rights connected to property. He states that intellectual property protects applications of ideas and information, but adds the requirement that the products must be of commercial value in order to warrant protection. He further states that all types of intellectual property are connected by one shared characteristic, namely that the rights granted by intellectual property law are effectively negative. The holder of the right may prohibit others from doing certain things. Cornish³⁶ mentions examples such as rights to stop pirates, counterfeiters, imitators and in certain instances even third parties who have reached the same idea independently, from exploiting intellectual property without a licence obtained from the owner of the right. Furthermore, there are some positive rights granted by intellectual property law, for example the right to register a trademark or to be granted a patent, but these rights are fundamentally subsidiary. These rights to control the actions of others granted to intellectual property owners are often not understood properly. Cornish³⁷ states that the owner of a right does not need the intellectual property right in order to exploit a market for its goods or services. For example; one does not need a patent in order to exploit one's own invention. However, if the qualified exclusive right to do so is desired, then a patent needs to be registered. Conversely, the right does not enable the owner to ignore the rights of other persons or to ignore public liabilities.

Bainbridge³⁸ also defines intellectual property by reference to other, tangible forms of property. He states that

‘intellectual property rights are a form of property which can be dealt with just as with any other property and which can be assigned, mortgaged and licensed. Intellectual property is property in a legal sense: it is something which can be owned and dealt with’.³⁹

He also discusses the jurisprudential character of intellectual property, stating that it gives rise to rights and duties. Intellectual property creates property rights, which grant the owner the right to do certain things pertaining to the subject matter. He explains by way of example that if the right is a copyright and the subject matter is a piece of music, the owner of the right has the exclusive right to make copies of the sheet music, to make an arrangement of the music and to control the performance of the music. In addition to the right to do things with

³⁵ Cornish WR *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th ed 1999) 6.

³⁶ Cornish WR *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th ed 1999) 6.

³⁷ Cornish WR *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th ed 1999) 6.

³⁸ Bainbridge DI *Intellectual Property* (1992) 10. Also see May C & Sell SK *Intellectual Property Rights – A Critical History* (2006) 5 and Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45. May, Sell and Alberts also compare intellectual property to tangible property for a better understanding.

³⁹ Bainbridge DI *Intellectual Property* (1992) 10.

the sheet music, the owner also has the negative right to prevent others from doing such things in relation to the music. This right may come into existence automatically upon the creation of the intellectual property to which the right pertains, for example copyright that originates automatically when the work is recorded. Bainbridge⁴⁰ explains that recording in this context pertains to the putting of ideas into some tangible form. In other cases the right comes into existence once the creation has been registered, such as with patents, trademarks and registered designs.

It becomes apparent from Bainbridge's analysis that intellectual property is concerned with rights. Applying Hohfeld's⁴¹ theory that every right has a correlative duty, Bainbridge states that in the context of intellectual property, the right to do certain things could be to make copies of a copyrighted work or to manufacture articles according to a patent or a design. The correlative duty to the right is a duty owed by all others not to infringe the right. However, he cautions that certain provisos must be added in this general plan. The law strives to reach a balance between conflicting interests in the area of intellectual property, in order to reach a justifiable compromise. Consequently, the duty not to infringe is not overly strict since there are many exceptions.⁴² Intellectual property rights are furthermore limited by their duration. Most intellectual property rights are granted only for a limited period of time, therefore Bainbridge submits that they may be compared to a lease. He proposes that 'as a rule of thumb, it can be said that the duration of a right is inversely proportional to its power'.⁴³

Conventionally, the objects of the assorted intellectual property rights include patents, copyright, registered designs and trademarks.⁴⁴ These are the traditional forms of intellectual property that are generally recognised and protected as property in private law and that should as a consequence be recognised and protected in constitutional property law as well.

The core focus in the definition of intellectual property as described by the authors seems to fall on the rights conferred by intellectual property law. These rights would be the objects of

⁴⁰ Bainbridge *DI Intellectual Property* (1992) 11.

⁴¹ Published in two articles: Hohfeld W 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale LJ* 16-59 and Hohfeld W 'Fundamental legal conceptions as applied in judicial reasoning' (1916) 26 *Yale LJ* 710-770.

⁴² Bainbridge *DI Intellectual Property* (1992) 12.

⁴³ Bainbridge *DI Intellectual Property* (1992) 12. This could imply that intellectual property rights are strong rights and therefore have to be limited in duration.

⁴⁴ Alberts W 'What is intellectual property?' (2007) *Nov De Rebus* 45-46 at 45.

the protection afforded by the constitutional property clause. It is necessary to examine these rights in detail to determine which kind of rights may be afforded constitutional protection. In view of these general considerations it becomes necessary to take a look at specific categories of traditional immaterial property or intellectual property in order to determine what the similarities and differences are and to establish the characteristics of the respective categories of property. This is necessary in order to verify which other categories of immaterial property interests may be protected. The examination of these specific intellectual property categories has a threefold purpose. The first is to give a brief introduction to the history of each category. Secondly, it is necessary to determine the specific rights granted in terms of each category of intellectual property in order to see which aspects require constitutional protection. Finally, the purpose is to show that the rights granted are not absolute and to determine in which specific cases there would be exemptions from the infringement of intellectual property rights. The question of why these rights should be protected is addressed in Chapter 4 (The Value of Immaterial Property). Chapter 6 (Immaterial Property Interests in International Law) deals with the international law aspects relating to immaterial property, but it is necessary to keep in mind that there are international treaties relating to intellectual property and other forms of immaterial property which globalise these interests Section 4.8 of Chapter 4 (The Value of Immaterial Property) also explicitly deals with the expansions of intellectual property currently taking place on a global scale.

2 3 Patents

In the first instance, a short explanation of the origins of patents is required. This is not meant to be a full overview of the history of patents, but merely serves as an indication that patent rights should not necessarily automatically be protected as constitutional property in its current form, but that it possibly needs to be reconsidered. Thereafter the requirements for the existence of a patent under South African private law are discussed. Finally the content and limitations on the extent of patent rights are analysed.

Patents are traditionally associated with creativity and invention. Shiva⁴⁵ states that patents may be granted to the inventor, who then holds an exclusive right to manufacture, distribute and sell the product which is the subject of the patent. Historically, patents have been put to

⁴⁵ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 11.

three diverse uses. The first is what Shiva⁴⁶ calls ‘patents for conquests’;⁴⁷ the second is ‘patents for inventions’;⁴⁸ and the last ‘patents for imports’.⁴⁹ However, these different functions have not been separated precisely in law. The problem with patent laws is that the old legal tools dating from colonial times have merely been adjusted slightly from time to time in order to cover new areas. As a consequence, when new intellectual property interests came into existence, no new patent laws were created specifically for these interests. New immaterial property interests were forced uncomfortably into existing patent law categories, bringing about only minor changes. The changes have never been fundamental enough to cater for different socioeconomic circumstances or time periods in history.⁵⁰

Shiva⁵¹ argues that the original use of patents was not to encourage inventiveness, as is commonly assumed. Historically, patents referred to ‘letters patent’, which is a literal translation of the Latin *litterae patentes*. These ‘letters patent’ or open letters were official documents in terms of which sovereign rulers conferred certain rights, privileges or titles. These letters were used to enable colonisation and to establish key monopolies.⁵² Consequently it becomes clear that patents have throughout history been closely associated with colonisation. Patents are often viewed by western powers as a natural right,⁵³ similar to property acquired by conquest during the period of colonialism. The first patent law that was passed with the purpose of stimulating invention was in March 1474, when the Venetian Senate passed the first general patent law. This law covered ‘new and ingenious’ devices that had not previously been manufactured in the Venetian domain. A distinction was not made

⁴⁶ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 11.

⁴⁷ Patents for conquest referred to open letters that were official documents conferring privileges, rights, ranks or titles. These were used for colonisation and the establishing of monopolies. The reason why it is interesting to note the previous use of patents for colonisation, is that patents have also been used rather recently to ‘steal’ traditional knowledge from traditional peoples. Similar arguments to that of colonising land have been used to justify this ‘theft’ in that the knowledge of the traditional peoples was not seen as either valuable or creative. Their knowledge was used by foreign companies (which may be analogised to colonisers) to derive patents and other forms of intellectual property, but no acknowledgement or monetary remuneration was offered to the original holders of the traditional knowledge. See sec 3.7 for an elaboration on traditional knowledge and the issues surrounding its unauthorised use and current developments towards protection. See p 114 fn 197 for a specific reference to the way the Patents Act was amended to counter this mischief.

⁴⁸ Patents for inventions were granted for new and innovative devices as an incentive.

⁴⁹ Patents for imports were granted to persons who introduced new devices that had already been invented in other countries. Persons were still rewarded for making the devices available, even if they did not invent it.

⁵⁰ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 11. Also see Dean OH ‘Hello, is anyone out there?’ (2007) *Jul Without Prejudice* 7-8, where he states that South African copyright law is outdated.

⁵¹ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 11-15.

⁵² See Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 3-1 where he confirms that these *litterae patentes* or ‘open letters’ were historically used by the English sovereigns to confer special rights and privileges. The right to a monopoly for inventions was also conferred by means of these ‘open letters’.

⁵³ The natural rights theory is discussed in Chap 4 (The Value of Intellectual Property).

between invented and imported patents. Accordingly a patent could be conferred upon a device which had already been manufactured elsewhere, but was 'new' to the country.⁵⁴

Furthermore, patents were previously used to facilitate the transfer of existing technologies from countries that were technologically more advanced. These inventions were 'borrowed' for a certain time and a patent rewarded and protected the person who introduced the invention. Nowadays such a transfer of technology would be seen as 'piracy' and patents are used to prevent it.⁵⁵ At the moment, knowledge is fast becoming more important than land and other tangible assets as the wealth of nations. Patents as property are central to the global economy. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)⁵⁶ of the World Trade Organization (WTO) was subsequently introduced in order to implement patent laws on a global scale.⁵⁷ Although this may create the risk that developed countries would not have ready access to new knowledge, there are specific articles in TRIPS which aim to counter this tendency. Article 7 of TRIPS specifically states that 'the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'. Article 66(2) specifies that 'developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base'. This indicates that positive measures are being taken to include less developed countries in the transfer of technology, but simultaneously also indicates that there is a risk that countries may attempt to stifle the transfer of technology for financial gain, otherwise such provisions would not have been necessary.

The Patents Act 57 of 1978 governs the registration of patents in South Africa.⁵⁸ Alberts⁵⁹ states that the main requirement for the registration of a patent is that it must be for a new

⁵⁴ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 11-13. Also see Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 2-2 for more specific information about the history of patents in South Africa.

⁵⁵ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 14-15.

⁵⁶ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994 (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

⁵⁷ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 18-20.

⁵⁸ See Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 15-30 for a basic overview of patents.

invention involving an inventive step. Such an invention must have the ability to be used or applied in trade, industry or agriculture. He states that a patent grants, among others, the exclusive right to make, use or import products embodying the invention. The term of a patent is twenty years from the date of application.⁶⁰ A patent granted in South Africa is valid throughout the whole of South Africa for this limited period.⁶¹ Once the term has expired, the invention falls within the public domain or intellectual property commons and the public is free to make use of the invention.⁶² In the case of patents for medicines, this implies that generic substitutes for the medicines may be placed on the market. The original medicine is no longer protected by the patent and the technology falls within the intellectual property commons.⁶³ The term of a patent limits the extent of the right granted, as such patent rights are not absolute. There are also certain situations where inventions are excluded from patentability and these also serve to limit rights.

Burrell⁶⁴ states that a patent is *prima facie* valid. Therefore a person who wants to rely on the invalidity of a patent carries the burden of proof. The court may revoke a patent if it is proven to be invalid. Section 25(1) of the Patents Act 57 of 1978 describes which inventions are patentable. A patent may be granted for a new invention that involves an inventive step and is capable of being used in trade, industry or agriculture. Section 25(2) of the Patents Act 57 of 1978 names specific exclusions from the concept of an invention for purposes of patents. These are a discovery; a scientific theory; a mathematical method; a literary, dramatic, musical or artistic work or any other aesthetic work; a scheme, rule or method for performing a mental act, playing a game or doing business; a program for a computer; or the presentation of information.⁶⁵ Section 25(4)⁶⁶ names further exclusions from patentability, namely

⁵⁹ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45. See sec 25 of the Patents Act 57 of 1978 and Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 1-22 – 1-26.

⁶⁰ Patents Act 57 of 1978 sec 46(1). See Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 1-3 and Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 27.

⁶¹ Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 1-4.

⁶² The intellectual property commons or so-called public domain is discussed in more detail in Chap 4 (The Value of Immaterial Property).

⁶³ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45. See Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 1-1. See further *Letraset Ltd v Helios Ltd* 1972 (3) SA 245 (A) 249 where the court stated that a patent involves a quid pro quo where the quid is the monopoly conferred on the inventor while the quo is the new knowledge that the public may use freely after the patent has expired.

⁶⁴ Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 1-3. See *Cape Explosives Co Ltd v Cullen and BSA Explosives Co Ltd* 1913 TPD 329 at 331-332.

⁶⁵ Patents Act 57 of 1978 sec 25(2) (a)-(g). See Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 1-24.

⁶⁶ Patents Act 57 of 1978.

inventions which promote offensive or immoral behaviour;⁶⁷ and any variety of animal or plant, or any essentially biological process for the production of animals or plants that is not a microbiological process.⁶⁸ In some instances, the purpose of these exclusions appear to be that certain information should remain in the public domain and should therefore not be propertised.⁶⁹ However, other exclusions are aimed at preventing immoral gains or exploitation or to exclude interests not suitable for patent protection, although they could be protected in other forms. The differences between patents and copyright are discussed in the following section on copyright.

From this analysis it becomes apparent that patents have not always been utilised for the promotion of creativity, but may be linked to other tools of colonisation. Consequently it cannot be assumed that constitutional property protection should necessarily be granted to all patents in their current form. It also becomes clear that there are certain definable rights linked to patents that could be protected under the constitutional property clause. If an invention complies with the strict requirements as set out in the Patents Act 57 of 1978, a patent is granted which entails the exclusive right to make, use or import products embodying the invention. These rights could possibly be protected by the constitutional property clause. There are also certain 'built-in' restrictions placed on patents by virtue of the Patents Act 57 of 1978. Some inventions may not be patented at all due to public considerations. Patents are also only valid for a specified period of time, namely twenty years. After this period of time, the invention falls within the public domain. The constitutional property clause also imposes certain restrictions via the deprivation and expropriation provisions, which could be useful to find a balance between patent protection and the interests in the public domain. Finally it should be noted that patents are accepted as a *sui generis* form of property in private law and should as such be accepted as constitutional property.

2 4 Copyright

In the first instance, the purpose of this section is to give a brief overview of the reasons behind the granting of copyright. Secondly the requirements for the subsistence of copyright and the rights granted are discussed. In the third instance the limitations placed on copyright

⁶⁷ Patents Act 57 of 1978 sec 25(4) (a).

⁶⁸ Patents Act 57 of 1978 sec 25(4) (b).

⁶⁹ See Chap 4 (The Value of Immaterial Property) for a more detailed discussion of the public domain or intellectual property commons.

are discussed. Finally, the implications of constitutional inclusion of copyright are discussed briefly; and the differences and similarities between patents and copyright are highlighted.⁷⁰

Dean⁷¹ gives a broad definition of copyright, namely that copyright is the exclusive right relating to works of intellectual content to do or to authorise others to do certain acts relating to that work. These acts represent the ways in which that work can be used for personal gain. The essential right under the law of copyright is the right to control these different uses of a work. According to Dean, the function and purpose of the law of copyright is to grant this essential right to the full.⁷² Regarding the philosophy of copyright, he states that copyright law attempts to create a system in terms of which the author of a creative work is awarded a qualified monopoly.⁷³ The reasoning behind this grant is twofold. Firstly, an author is rewarded for the effort, creativity and talent expended in creating the work. Secondly, the qualified monopoly is awarded as an incentive to the author to create further and improved works in future.⁷⁴ In *Biotech Laboratories (Pty) Ltd v Beecham Group PLC & Another*,⁷⁵ the court questioned the soundness of this principle of copyright law. The court (in an *obiter dictum*) argued that the earliest form of copyright was granted to printing companies and not to authors. The incentive and reward theory consequently does not really convince in the context of copyright.⁷⁶

⁷⁰ Chap 5 (Immaterial Property Interests in the Constitution) discusses constitutional property and its implications for intellectual property and unconventional immaterial property forms in more detail.

⁷¹ Dean OH *Handbook of South African Copyright Law* (1987) 1-1. Also see Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 73-84 for an overview of copyright.

⁷² It has to be noted here that the law of copyright also provides for certain limitations on copyright, mostly for the interest in the public domain. See Chap 4 (The Value of Immaterial Property).

⁷³ Performers' rights are related to copyright and are protected by the Performers' Protection Act 11 of 1967. In constitutional law, these rights would be protected in a similar way as the rights that relate to copyright and as such it is not necessary or useful to deal with them at great length. Similar to copyright, certain requirements must be met before private law property protection will be granted to a performance, but once they are met protection granted by the Performers' Act is automatically conferred on such performance. A performance that takes place; is broadcast without a fixation; or is first fixed in any member state of the World Trade Organisation qualifies for such protection. There are also specific negative rights granted to such performances, in other words the owner of the rights may prohibit other persons from doing certain acts with the work as specified in the Performers' Act. Similar to copyright, once a performance is granted protection, the associated rights may qualify for constitutional property protection, at least in principle. For a concise explanation of performers' rights see Grealy P, Penfold G, Copenhagen VL, Mills A & Gardner Z (original text by Grealy P, Batsri G, Penfold G, Cox A, Milo D, Fikelepi U & Coehlo R) 'Entertainment' in Joubert WA & Faris JA *The Law of South Africa 8 Part 2* (2nd ed 2005) 227-301 at 271-273.

⁷⁴ Dean OH *Handbook of South African Copyright Law* (1987) 1-1. These theories are discussed in greater detail in Chap 4 (The Value of Immaterial Property).

⁷⁵ 2002 (4) SA 249 (SCA) 259.

⁷⁶ Also see Rose M *Authors and Owners. The Invention of Copyright* (1994) 67-91.

The Copyright Act 98 of 1978 governs the law of copyright in South Africa. Certain conditions must be met before copyright protection will subsist in a work. There must be an eligible ‘work’⁷⁷ and a ‘qualified person’.⁷⁸ Furthermore the work must be original⁷⁹ and must exist in a material form.⁸⁰ Propriety of the work is also required. Propriety entails that works that are considered by society to be indecent, improper or lacking in propriety will not be protected by the law.⁸¹ Although Dean concedes that ‘it is widely accepted that the law will not protect works which are considered by society to be improper, indecent or lacking in propriety’⁸² he argues, in my opinion correctly so, that propriety is not a condition for the subsistence of copyright, but a condition for its enforcement. As such copyright would still subsist in a work lacking propriety, but courts may refuse to enforce the right.⁸³ The Copyright Act 98 of 1978 prescribes no formalities for the acquisition of copyright in a work. Copyright comes into existence automatically, provided a work meets these specified conditions.

Regarding the first requirement of an eligible ‘work’ there are four different factors that could cause a ‘work’ to be ineligible. The work must be of a certain category, it must have sufficient substance, it must not be commonplace and considerations of public policy may also be taken into account.⁸⁴ Section 2(1) of the Copyright Act 98 of 1978 currently protects the following classes or broad categories of works: literary, musical and artistic works, sound recordings, cinematographic films, broadcasts (television and sound), programme-carrying signals, published editions and computer programs.

⁷⁷ Dean OH *Handbook of South African Copyright Law* (1987) 1-5 – 1-15. Also see Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 73-75.

⁷⁸ Dean OH *Handbook of South African Copyright Law* (1987) 1-20. See further Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 75.

⁷⁹ Dean OH *Handbook of South African Copyright Law* (1987) 1-15. See Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 75.

⁸⁰ Dean OH *Handbook of South African Copyright Law* (1987) 1-18 – 1-19. Also see Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 75.

⁸¹ See *Goeie Hoop Uitgewers (Edms) Bpk v Central News Agency and Another* 1953 (2) SA 843 (W) where Price J stated in par H: ‘I have come to the conclusion that the article in question is of such a scandalous character that no copyright exists in it.’

⁸² Dean OH *Handbook of South African Copyright Law* (1987) 1-19.

⁸³ Dean OH *Handbook of South African Copyright Law* (1987) 1-19.

⁸⁴ See *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A), *Francis Day & Hunter v Twentieth Century Fox Corporation Ltd & Others* [1940] AC 112 (PC) and *Jacana Education (Pty) Ltd v Frandsen Publishers* 624 JOC (T). These cases also demonstrate the interplay between the requirement that there must be an eligible work and the requirement of originality. It should be noted here that the court only considers whether the work is commonplace as one of the factors in determining whether there is an eligible ‘work’, which is the first requirement for the subsistence of copyright. This should not be confused with the requirement for a registered design that it must not be commonplace (sec 14(1) (b)(ii) of the Designs Act 195 of 1993).

A ‘qualified person’ must be the author of a work in order for copyright to come into existence. Such a person is an individual who is a citizen of, or is domiciled or resident in South Africa or a country to which the Copyright Act’s operation has been extended by way of proclamation. In the case of a juristic person, a ‘qualified person’ would be a body incorporated under South African law or the law of a country to which the Copyright Act has been extended.

The most important substantive conditions for the subsistence of copyright in a ‘work’ are originality and existence in material form respectively. Section 2(1) of the Copyright Act 98 of 1978 prescribes the requirement of originality for all ‘works’ in South Africa. The requirement of originality does not necessitate any uniqueness or inventive step, but it requires that the work should be the product of the author’s own work and accomplishments. Therefore it should not be directly copied from other sources. A work may use aspects of an existing work, provided that sufficient own labour has been invested.⁸⁵ The standard for originality as required by the courts is relatively low. In *Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd*⁸⁶ the court found that the requirement of own effort merely requires that the creator’s own effort should be more than *de minimis*.⁸⁷

In *Waylite Diary CC v First National Bank Ltd*⁸⁸ the court decided that the work⁸⁹ was not a ‘work’ of the right type for purposes of copyright and as a result did not find it necessary to decide the requirement of originality separately. However, in an *obiter dictum* the court stated that an objective and subjective test should be used in order to determine whether a work was

⁸⁵ Dean OH *Handbook of South African Copyright Law* (1987) 1-15 – 1-16.

⁸⁶ 1999 JOC 707 (T).

⁸⁷ See *Kalamazoo Division (Pty) Ltd v Gay & Others* 1978 (2) SA 184 (C), *Northern Office Microcomputers (Pty) Ltd & Others v Rosenstein* 1981 (4) SA 123 (C), *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) and *Waylite Diary CC v First National Bank* 1995 (1) SA 645 (A) 649H-I, 650D and 653C-D.

⁸⁸ 1995 (1) SA 645 (A).

⁸⁹ *Waylite Diary* supplied diaries for the employees of First National Bank for some years. At some point First National Bank awarded the tender to another company who used the format of the diaries. *Waylite Diary* claimed to have copyright in the format of the diaries. The new company used the identical format that *Waylite Diary* had been using. ‘The format of the appointment pages in which copyright is claimed, consists of pairs of facing pages, each pair dealing with a particular week, beginning on a Monday. The left-hand page furnishes on the first line the name of the month in English and Afrikaans and also the number of the week. The days of the week are then listed (also in both languages) and dated on the same page, with four horizontal lines of writing space for weekdays and two horizontal lines each for Saturday and Sunday. The right-hand page has a number of lines for the making of notes and at the foot a calendar consisting of the current and the two succeeding months. The colours and typeface used were standard in terms of FNB’s corporate identity specifications.’ *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A) 649. The court considered whether this could be a literary or an artistic work, but concluded that it was not a work for the purposes of copyright protection. See *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A) 648-649, 653.

original. The court named factors such as whether the work was a direct copy and whether enough labour and dexterity of the right sort have been applied in the creation of the work. The court determined this by looking at the final product.⁹⁰ Dean⁹¹ argues that this position is incorrect as it is inappropriate to introduce an element of objectivity into the test for originality. The objective test should only be used to determine whether there is in fact a ‘work’ for the purposes of copyright. Thereafter the test for originality should be purely subjective.

The second important substantive condition is that a work must exist in a material form, save in the case of broadcasts and programme-carrying signals. Therefore, a work must exist in writing or some other material form.⁹² Dean states that a maxim in copyright law is that there is no copyright in ideas. Only the material form of the expressed idea can be the subject of copyright.⁹³ In section 1(1) of the Copyright Act 98 of 1987 ‘writing’ is defined as ‘any form of notation, whether by hand or by printing, typewriting or any similar process’. In *Northern Office Micro Computers (Pty) Ltd v Rosenstein*⁹⁴ the court held that a work does not come into existence for the purposes of copyright until it is reduced to a material form.⁹⁵

Once a ‘work’ meets these conditions, it will be protected by copyright for the duration of the author’s life plus 50 years over and above that, unless the work was never published during the author’s lifetime, in which case the work is protected for 50 years from the first act of publishing. This is the general rule for literary, musical and artistic works.⁹⁶ There are also specific rules for the other categories of works, in which case a work will only be protected for 50 years.⁹⁷ The author of a copyright protected work has certain moral rights in addition to copyright.⁹⁸ These moral rights consist of the right of paternity and the right of integrity respectively. The right of paternity allows the author of the work to claim authorship of the

⁹⁰ *Waylite Diary CC v First National Bank* 1995 (1) SA 645 (A).

⁹¹ Dean OH *Handbook of South African Copyright Law* (1987) 1-17.

⁹² Secs 2(2) and 44 of the Copyright Act 98 of 1978. See *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) and *Fichtel and Sachs Aktiengesellschaft v Laco Parts (Pty) Ltd & Another* 174 JOC (T) where the respective courts held that the mere availability of copies may be sufficient to fulfil the publication requirement.

⁹³ Dean OH *Handbook of South African Copyright Law* (1987) 1-18. Also see Alberts W ‘Copyright in ideas’ (2008) 16(2) *JBL* 48-50 where he argues that the maxim that there can be no copyright in ideas is qualified in certain instances, such as where there are co-authors of a scientific publication.

⁹⁴ 1981 (4) SA 123 (C) 129.

⁹⁵ According to the court in *Galago Publishers v Erasmus* 1989 (1) SA 276 (A) 283, the subject of copyright is the material form of expression of the idea.

⁹⁶ As set out in secs 3(2) (b)-(f) and 3(3)-(5) of the Copyright Act 98 of 1987. Also see Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 77.

⁹⁷ Sec 3(2) (a) of the Copyright Act 98 of 1987.

⁹⁸ As set out in sec 20 of the Copyright Act 98 of 1987.

work. The right of integrity enables the author to object to distortions of his work.⁹⁹ These rights are essentially personal rights and not economic or property rights. The Copyright Act 98 of 1987 does not provide a term for these moral rights, but Dean¹⁰⁰ suggests that it would be for the duration of the author's life, since the Act does not make provision for moral rights after the death of the author. These moral rights are connected to the author of a work and not to the copyright.

Once copyright subsists in a work, the owner of the copyright has certain exclusive rights pertaining to the work. Dean defines copyright as essentially 'the right to do or authorise others to do, or prevent others from doing, the acts which are designated in respect of each of the different types or categories of works which can be the subjects of copyright, as the monopoly of the copyright owner'.¹⁰¹ Section 6-11B of the Copyright Act 98 of 1987 lists certain acts or dealings with the work, which may be exercised by the copyright owner. There are certain acts listed for each category of works.¹⁰² These are the exclusive rights of the copyright owner, for example the right to make copies of the work. These rights could be infringed by means of so-called primary infringement or secondary infringement. Primary infringement occurs when someone does something with the work which falls within the exclusive rights of the copyright owner, provided this takes place without the copyright owner's permission.¹⁰³ Indirect or secondary infringement takes place when someone deals in unauthorised copies or permits infringement.¹⁰⁴ Since these exclusive rights are not absolute, there are exemptions from the prohibition against infringement. These exemptions serve to

⁹⁹ Dean OH *Handbook of South African Copyright Law* (1987) 1-61 – 1-65.

¹⁰⁰ Dean OH *Handbook of South African Copyright Law* (1987) 1-61 – 1-65.

¹⁰¹ Dean OH *Handbook of South African Copyright Law* (1987) 1-33.

¹⁰² For example sec 6 deals with the nature of copyright in literary or musical works, stating that:

'Copyright in a literary or musical work vests the exclusive right to do or authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the work in any manner or form;
- (b) publishing the work if it was hitherto unpublished;
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
- (f) making an adaptation of the work;
- (g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.'

¹⁰³ Dean OH *Handbook of South African Copyright Law* (1987) 1-37.

¹⁰⁴ Dean OH *Handbook of South African Copyright Law* (1987) 1-44. See further Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 81-83.

limit the copyright owner's monopoly. The exemptions include¹⁰⁵ the fair dealing exemption;¹⁰⁶ use for judicial proceedings;¹⁰⁷ quotations;¹⁰⁸ illustrations for teaching;¹⁰⁹ ephemeral copies;¹¹⁰ works delivered in public;¹¹¹ reproductions in press or broadcast;¹¹² official texts, political speeches and news of the day;¹¹³ and reverse engineering of products.¹¹⁴

It appears from this discussion that the historic reasons why copyright should be protected cannot be accepted as is, but may require some re-evaluation.¹¹⁵ However, there are clearly

¹⁰⁵ There are still more exemptions which are not discussed for the purposes of this chapter. The exemptions have very technical requirements. The purpose is merely to demonstrate that copyright is not absolute. For a full discussion see Dean OH *Handbook of South African Copyright Law* (1987) 1-51 – 1-60F. Also see Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 83-84.

¹⁰⁶ The concept of 'fair dealing' is vague, but this is presumably to allow courts to take all factors into consideration when determining infringement. Dean OH *Handbook of South African Copyright Law* (1987) 1-51 – 1-52 states that '[a]ny fair dealing with a literary, musical or artistic work, or with a broadcast or published edition, does not infringe that copyright when it is –

- (a) for the purposes of research or private study by, or the personal private use of, the person using the work;
- (b) for the purposes of criticism or review of that work or of another work; or
- (c) for the purposes of reporting current events –
 - i) in a newspaper, magazine or similar periodical; or
 - ii) by means of broadcasting or in a cinematographic film'.

¹⁰⁷ Dean OH *Handbook of South African Copyright Law* (1987) 1-53: When a work is reproduced for purposes of the report for judicial proceedings, the copyright in a literary, musical or artistic work; a cinematographic film; sound recording; broadcast; published edition; or computer program, the copyright of the work is not infringed.

¹⁰⁸ Dean OH *Handbook of South African Copyright Law* (1987) 1-54: A summary or quotation taken from a work does not infringe the copyright in a literary or musical work; a cinematographic film; sound recording; broadcast; or computer program. The quotation must, however, be used in line with fair practice and the name of the author must accompany the quotation.

¹⁰⁹ Dean OH *Handbook of South African Copyright Law* (1987) 1-54: A literary, musical or artistic work; a cinematographic film; sound recording; broadcast; published edition; or computer program may be used for the purposes of teaching by way of illustration as long as the extent of use is justified by the purpose and the name of the author accompanies the illustration.

¹¹⁰ Dean OH *Handbook of South African Copyright Law* (1987) 1-54: Where a copy of a literary, musical or artistic work; a cinematographic film; sound recording; broadcast; published edition; or computer program is made by a broadcaster for a lawful broadcast and the copy is destroyed within six months after its creation, copyright in the work is not infringed.

¹¹¹ Dean OH *Handbook of South African Copyright Law* (1987) 1-54A: Where a literary work such as a lecture is delivered in public, its copyright is not infringed when it is broadcast for informatory purposes.

¹¹² Dean OH *Handbook of South African Copyright Law* (1987) 1-54A: The copyright of a work published in a newspaper or periodical or an article used in a broadcast is not infringed if the topic is of current economic, political or religious nature.

¹¹³ Dean OH *Handbook of South African Copyright Law* (1987) 1-54A: Official texts that are of a legislative, administrative or legal nature; or translations thereof do not acquire copyright. The right to make collections of such speeches still belongs to the author.

¹¹⁴ Dean OH *Handbook of South African Copyright Law* (1987) 1-54A: Where three-dimensional reproductions of an artistic work has been made available to the public with the consent of the owner, whether inside or outside of South Africa, its copyright is not infringed if someone makes copies or adaptations without the copyright owner's consent. The authorised productions must have a utilitarian purpose and must be manufactured by an industrial process. See Dean OH *Handbook of South African Copyright Law* (1987) 1-56 – 1-59 for a full discussion of the requirements.

¹¹⁵ This is done in Chap 4 (The Value of Immaterial Property).

defined rights that could enjoy protection under the constitutional property clause if the requirements for copyright protection are met. The Copyright Act 98 of 1987 also sets down certain limits on copyright. It is not ideas, but only the embodiment of ideas that are protected by copyright. Ideas should stay in the public domain. Copyrights are furthermore also limited by way of their duration. Copyright is accepted as a *sui generis* form of property in private law and should as a result be accepted under the wider scope of constitutional property as well. Finally, it is also necessary to highlight the differences and similarities between patents and copyrights.

Copyright does not require an inventive step, such as is required for a patent. The subject of copyright does not need to be novel as is required for patents; there must merely be enough own labour invested in the creation of the work. The subject of copyright need not have the ability to be applied in trade, industry or agriculture either, as is the case with a patent. Furthermore, the term¹¹⁶ of copyright is substantially longer than the 20 years granted for a patent, namely the duration of the author's life plus 50 years. Copyright subsists automatically once the requirements have been met and does not require registration in order to come into existence, as is the case with patents.

It appears that the requirements and duration of patents and copyright are quite different. However, in both cases certain specific rights are discernible. It is possible to protect these rights under the constitutional property clause since both patents and copyrights are recognised and protected as *sui generis* forms of property in private law. There are also similarities between patents and copyright. The qualified monopoly that is granted to copyright authors is limited in time. Once the term has passed, the work falls into the public domain and others may freely use it. This is similar to the position with patents. Both forms of intellectual property are limited and the deprivation and expropriation provisions in the property clause could serve to further limit the property rights if it is in the public interest.

2.5 Registered Designs

Alberts¹¹⁷ affirms that registered design protection relates to the appearance of an object. In terms of the Designs Act 195 of 1993, aesthetic and functional designs may be registered,

¹¹⁶ According to sec 3(2) (a) of the Copyright Act 98 of 1987 the term of copyright is equal to the lifetime of the author plus 50 years.

¹¹⁷ Alberts W 'What is intellectual property?' (2007) Nov *De Rebus* 45-46.

provided they are produced by way of an industrial process. Alberts explains the difference between an aesthetic and a functional design by stating that an aesthetic design is applied to an article, among others, for its form, pattern or decoration. This design should appeal to the eye. Aesthetic designs characteristically include articles such as jewellery. Alberts gives the example of a watch designed by Jenna Clifford as a demonstration of an aesthetic design. An aesthetic design also needs to be novel and innovative in order to be registrable.¹¹⁸ In order to meet this requirement, such a design must not be part of the state of the art directly before the application date for the design or the date on which the design was first released to the public.¹¹⁹ By contrast, a functional design may protect the features that are necessitated by the function that the designed article must perform. Alberts¹²⁰ gives examples of functional designs such as the sole of a shoe and a brick. He notes that both these examples may also contain purely aesthetic features. A functional design is required to be new and not commonplace. Once these requirements are met and a design is registered, an aesthetic design is protected for a term of 15 years¹²¹ and a functional design for a term of 10 years.¹²²

The term of protection for a design is shorter than both the term of copyright and a patent. The registration of a design confers upon the owner the right to prohibit third parties from manufacturing or importing an article making use of the design.¹²³ Similar to patents and copyright, designs also confer specific rights on the owner of the design. Designs are also recognised and protected as a *sui generis* form of property under private law and should be accepted as constitutional property without any difficulty. Constitutional interpretation would simultaneously make provision for the protection of rights in designs, but also have the potential to limit these rights.

¹¹⁸ See *Clipsal Australia (Pty) Ltd v Trust Electrical Wholesalers* 2009 (3) SA 292 (SCA) par 13 where the Supreme Court of Appeal dealt with registered designs under the Designs Act 195 of 1993 for the first time. The court confirmed the principle that novelty should be assessed against the background of the prior art relevant to the design. The court stated that a new combination of prior art is permissible and such a design would still be novel. Joffe F ‘Designs registered under the Designs Act’ (2007) 15(2) *JBL* 24-27 at 27; *Clipsal Australia (Pty) Ltd v Trust Electrical Wholesalers* 2009 (3) SA 292 (SCA) provides some welcome clarity on aspects of the Designs Act, but simultaneously highlights ‘just what a poorly thought out mongrel the Act is’.

¹¹⁹ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45.

¹²⁰ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45.

¹²¹ Designs Act 195 of 1993 sec 22(1) (a).

¹²² Designs Act 195 of 1993 sec 22(1) (b). Also see Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 9-1 and 9-5 where he confirms that the design is protected for the fixed term after which it falls into the public domain, similar to the case of a patent. This principle was fixed in *Premier Hangers v Polyoak (Pty) Ltd* 1997 (1) SA 416 (A) 424I-426I.

¹²³ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45. Also see Burrell TD *Burrells South African Patent and Design Law* (3rd ed 1999) 9-56 for an explanation of the specific rights conferred by a design.

2 6 Trademarks

This section deals with trademarks and has the purpose of setting out a brief history of trademarks; describing the rights associated with a trademark; ascertaining why trademark rights should be protected by the constitutional property clause; setting out the implications of constitutional interpretation, namely protection and limitation of property rights in trademarks; and finally describing the differences and similarities between trademarks and patents on the one hand, and trademarks and copyright on the other.

The function of a trademark at common law was to indicate the origin of goods. The term ‘origin’ was used restrictively to refer to the manufacturer of the goods. This narrow function has been progressively widened by subsequent statutes. The 1947 act widened the function of a trademark to include the connection between the goods and the registered proprietor as well as the user of the mark. Since the 1916 act, there was already an ‘origin’ function and there was a ‘distinguishing’ function.¹²⁴ The basic functions are to show the origin, to guarantee quality, to distinguish products or services and to serve as an advertisement. On the whole, trademarks may also be said to protect the goodwill of a particular business.

The Trade Marks Act 194 of 1993 governs the registration of trademarks.¹²⁵ A trademark may consist of a word, a logo or a shape. According to the Trade Marks Act 194 of 1993, the first requirement is that a trademark must be distinct prior to registration in order to qualify for such registration on the trademarks register. Alberts¹²⁶ explains that distinctiveness may be acquired in two different ways. A trademark may be inherently distinctive, or it can become distinctive through use. He suggests that ‘Lamborghini’ would be an example of inherent distinctiveness, while ‘Shatterprufe’ which is essentially a description, has become distinctive through use. The registration of a trademark customarily confers upon the property owner the right to prohibit other, unauthorised parties from using a mark that is confusingly similar in relation to the same or similar goods. A wider scope of protection is available for famous marks, for example McDonalds.¹²⁷

The Trade Marks Act 194 of 1993 defines a ‘mark’ as ‘any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration,

¹²⁴ Webster GC & Page NS *The South African Law of Trade Marks* (3rd ed 1986) 3-10 – 3-10(1).

¹²⁵ See Von Seidel M *Intellectual Property – The John & Kernick Guide* (1998) 40.

¹²⁶ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45.

¹²⁷ Alberts W ‘What is intellectual property?’ (2007) Nov *De Rebus* 45-46 at 45.

pattern, ornamentation, colour or container for goods or any combination of the aforementioned'.¹²⁸ Webster and Page¹²⁹ state that the essence of a mark is its ability to be represented graphically. This implies that the sign should have the ability to be represented visually, which would include representation by means of writing, a diagram, a linear figure or symbolic curve, a photograph, a drawing, painting, engraving, etching, computer created representation or something similar. This is not an exclusive list, hence there may also be other means of representation.¹³⁰ In *Triomed (Pty) Ltd v Beecham Group plc*¹³¹ the court *a quo* held that a mark in the form of a tablet was not sufficiently certain to inform the public as to the extent of the monopoly. On appeal, the court in *Beecham Group plc v Triomed (Pty) Ltd*¹³² held that there was no intrinsic objection to the registration of a trademark over the shape of a tablet. Whether such a mark would be distinguishing for the purposes of section 9 of the Trade Marks Act 194 of 1993 is a different issue.¹³³

From section 2(1) and 2(2) of the Trade Marks Act 194 of 1993 it appears that there are specific categories of marks. The first category is a 'device,' which is defined in section 2(1) (viii)¹³⁴ as 'any visual representation or illustration capable of being reproduced upon a surface, whether by printing, embossing or by any other means'. Colour is specifically included as a 'mark', as long as the precise shade of the colour is stated. A specific sound may also be the object of a trademark. From the limitations in section 2(2) of the Trade Marks Act 194 of 1993, it appears that no provision has been made for smells to serve as a 'mark'. Similarly, a specific taste may also not be registered as a 'mark'. Unlike copyright, which subsists automatically, a trademark needs to be registered before any rights are conferred. The application needs to specify in which of the 45 categories the trademark would fall once granted. Examples of these categories are class 5, which includes medicines and class 42, which includes legal services. Section 37 of the Trade Marks Act 194 of 1993 determines that a trademark is perpetual in principle. It may be renewed every 10 years. The first 10 years commence from the date of application and thereafter a renewal fee must be paid for each term, omission of which may lead to the trademark being scrapped from the register. In this regard, trademarks differ widely from the other categories of intellectual

¹²⁸ The Trade Marks Act 194 of 1993 in the list of definitions.

¹²⁹ Webster GC & Page NS *The South African Law of Trade Marks* (3rd ed 1986) 3-7.

¹³⁰ Webster GC & Page NS *The South African Law of Trade Marks* (3rd ed 1986) 3-7.

¹³¹ 2001 (2) SA 522 (T) 540 E-F.

¹³² 2003 (3) SA 639 (SCA) par 10.

¹³³ Webster GC & Page NS *The South African Law of Trade Marks* (3rd ed 1986) 3-7 – 3-8.

¹³⁴ Trade Marks Act 194 of 1993.

property, since trademarks are not limited by way of duration. Trademarks are limited by other means.

There are so-called ‘absolute grounds’ on which the Registrar may refuse to register a particular trademark, as expounded in section 10(2) of the Trade Marks Act 194 of 1993. Section 10(2) (a) states that if a mark fails to distinguish, it may not be registered. A mark that is purely descriptive regarding quality, quantity, purpose, geographic origin and so forth, may not be registered.¹³⁵ Similarly, marks that are purely generic may not be registered.¹³⁶ However, a generic mark that falls within one of the categories of section 10(2)¹³⁷ may still acquire distinctiveness through use. There are also certain ‘relative grounds’ for the refusal to register a trademark. The most important of these grounds is where there is a prior registered mark and confusion may be caused¹³⁸ and where a ‘well-known’ registered mark may be diluted.¹³⁹ Section 10(14),¹⁴⁰ pertaining to confusion, states that a mark may be refused registration if it is similar or identical to a mark which is already registered; where the application is in relation to the same goods or services; and the use would probably lead to confusion or would mislead. This particular limitation on trademarks is mainly to protect the consumer.

Once a mark is registered as a trademark, the trademark owner has certain exclusive rights pertaining to the mark. When other persons use the mark without authorisation, infringement occurs. Section 34(1) of the Trade Marks Act 194 of 1993 regulates the three situations when such a trademark would be infringed. This would be the case when there was unauthorised use in the course of trade of an identical or similar mark in relation to identical goods or services, where confusion is likely to occur.¹⁴¹ The second situation differs from the first in that the goods or services need only be similar, not identical. The nature of the confusion required is also an important distinction between the two forms of infringement.¹⁴² The third scenario is where a registered well-known mark may be diluted due to its unauthorised use in

¹³⁵ According to sec 10(2) (b) of the Trade Marks Act 194 of 1993.

¹³⁶ According to sec 10(2) (c) of the Trade Marks Act 194 of 1993.

¹³⁷ Trade Marks Act 194 of 1993.

¹³⁸ Sec 10(14) of the Trade Marks Act 194 of 1993.

¹³⁹ Sec 10(17) of the Trade Marks Act 194 of 1993.

¹⁴⁰ Trade Marks Act 194 of 1993.

¹⁴¹ Sec 34(1) (a) of the Trade Marks Act 194 of 1993.

¹⁴² Sec 34(1) (b) of the Trade Marks Act 194 of 1993. See *BMW AG v Verimark (Pty) Ltd* 2007 (6) SA 263 (SCA). It must be noted that the purpose of this section is merely to show that trade mark rights are protected as property in private law on a *sui generis* basis provided that certain requirements are met as set forth in the Trade Marks Act; and not to give a full discussion and analysis of all the aspects relating to trade marks.

the course of business.¹⁴³ There are, however, also certain defences which may be used against trademark infringement.¹⁴⁴ As such the holder of a trademark does not have an absolute right in terms of the trademark right. There are eight different defences which may be used in reference to section 34(1).¹⁴⁵ These defences are *bona fide* use of own name; *bona fide* description; *bona fide* use to indicate intended purpose; use on genuine goods; *bona fide* use of utilitarian features; use for which the registration does not extend; concurrent registration; and the case where freedom of expression is perceived as more important than a specific trademark right.

The first defence is the *bona fide* use of one's own name, the name of the business or that of the business predecessor. However, it must also be fair use.¹⁴⁶ The second defence pertains to descriptive use. A *bona fide* description of the quality, quantity, purpose etcetera would not constitute trademark infringement.¹⁴⁷ Thirdly, *bona fide*, reasonable use in order to demonstrate a product or service's purpose would be allowed.¹⁴⁸ In the fourth place, where a trademark has been used on a product with the consent of the owner in order to import, sell or resell the goods, there would be an allowable defence.¹⁴⁹ The fifth defence refers to the *bona fide* use of useful characteristics of a trademark, for example shape or colour. This prevents the misuse of trademarks as patents or designs.¹⁵⁰ Furthermore a trademark may also be used when the specific aspect being used falls outside the scope of the registration.¹⁵¹ The penultimate defence pertains to honest concurrent use, in the case where both parties have the same registered trademark.¹⁵² Finally, section 36(1) of the Trade Mark Act 194 of 1993 protects users with pre-existing rights. This is only the case where the use was *bona fide* and for a period before the date of first use or registration of the mark used.

A further category where there may sometimes be exemption from infringement is in the case of freedom of speech or parody. In *South African Breweries International (Finance) BV t/a*

¹⁴³ Sec 34(1) (c) of the Trade Marks Act 194 of 1993.

¹⁴⁴ Sec 34(2) (a)-(g) of the Trade Marks Act 194 of 1993 sets out specific defences and sec 36 pertains to established rights.

¹⁴⁵ Trade Marks Act 194 of 1993.

¹⁴⁶ Sec 34(2) (a) of the Trade Marks Act 194 of 1993.

¹⁴⁷ Sec 34(2) (b) of the Trade Marks Act 194 of 1993.

¹⁴⁸ Sec 34(2) (c) of the Trade Marks Act 194 of 1993.

¹⁴⁹ Sec 34(2) (d) of the Trade Marks Act 194 of 1993.

¹⁵⁰ Sec 34(2) (e) of the Trade Marks Act 194 of 1993.

¹⁵¹ Sec 34(2) (f) of the Trade Marks Act 194 of 1993.

¹⁵² Sec 34(2) (g) of the Trade Marks Act 194 of 1993.

*Sabmark International v Laugh It Off Promotions CC*¹⁵³ a constitutional defence was raised for the first time in a trademark dispute. The applicant had a registered trademark for the words ‘Carling Black Label’ and for a representation of the label of its product. The respondent sold T-shirts with the slogan ‘Black Labour, White Guilt’, but other than that the marks were the same as SAB’s. SAB brought an action in terms of section 34(1) (c) of the Trade Marks Act 194 of 1993, which prohibits the use of a well-known mark where use would be detrimental to or take unfair advantage of the distinctive character or repute of a mark. The court found that there was trademark infringement and Laugh It Off subsequently lodged an appeal.

On appeal, in *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*¹⁵⁴ (hereafter *Laugh It Off v SAB International*) the court stated that the Trade Marks Act 194 of 1993 should not infringe freedom of expression unduly. The court weighed up freedom of expression against the right to property and freedom of trade. The court concluded that Laugh It Off’s use of SAB’s trademark was not justified in terms of freedom of speech, since there were other means available to Laugh It Off to convey their message than selling T-shirts. The court also said that a parody that is purely insulting is not protected, since it is defamatory. When Laugh It Off lodged an appeal to the Constitutional Court,¹⁵⁵ the decision of the Supreme Court of Appeal was reversed. The Court held that freedom of speech and parody are not defences *per se*, but that they may be considered as factors relevant to determining the unfairness of the prejudice suffered by the trademark holder (in this case SAB). Sachs J balanced the right to freedom of expression and the right to property.¹⁵⁶

The Constitutional Court identified factors that might be taken into account to determine whether trademark infringement might be excused. The first is the primary nature of use, for example whether it is commercial or for commentary. On the facts the court excused the limited commercial use, since it was merely to ensure the continued existence of Laugh It Off.¹⁵⁷ The second factor is the medium chosen for the expression and the context in which

¹⁵³[2003] 2 All SA 454 (C) par 16.

¹⁵⁴ 2005 (2) SA 46 (SCA) par 29-34.

¹⁵⁵ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁵⁶ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) 231-232.

¹⁵⁷ It is interesting to note that Laugh It Off’s shirts are quite expensive, comparable to so-called ‘name brands’.

the trademark was used. The Court stated that the medium used was T-shirts and that the existence of alternative mediums could be excused since it would have been less effective. The third factor identified by the court was the offensiveness of the use. On the facts the court found the offensiveness minimal. The court pertinently stated that whether the court finds the parody funny is not a factor. It should however be an important factor, since it might still influence the court subconsciously.¹⁵⁸

From the history of trademarks it becomes apparent that the purpose of trademarks had initially been in the interest of the public, namely to protect consumers by ensuring quality. Provided that trademarks comply with the requirements set out in the Trade Marks Act 194 of 1993, there are specific rights connected to the trademarks that are protected as property in private law. These rights could also be protected under the constitutional property clause similar to patents and copyright, since they are a *sui generis* form of property in private law. As demonstrated in *Laugh It Off v SAB International*,¹⁵⁹ courts are willing to accept trademarks as constitutional property. This also has the implication that other forms of intellectual property would in all likelihood be accepted as property for constitutional purposes. Trademarks will be protected in terms of the constitutional property clause, at least equal to the protection enjoyed by other forms of property. However, the constitutional property clause also limits property rights and consequently trademark rights will be subject to the limitations of deprivation and expropriation, similar to other tangible and intangible categories of property.

By contrast to the other intellectual property categories; namely patents, copyrights and designs; trademarks are not limited by way of their duration. However, trademarks are limited by being deregistered after 10 years if they are not re-registered upon the payment of a fee (provided that they also still comply with the substantial requirements for a trademark, notably that they must remain distinctive and still be in use). The problem with copyrighted works is that the vast majority of works are not economically viable to print for more than about five or ten years unless they are works by, for example, Shakespeare. This causes the works to become inaccessible to the public. Perhaps it would be a better solution to make

¹⁵⁸ The full extent of the constitutional implications of this case is discussed in Chap 5 (Immaterial Property Interests in the Constitution). The short discussion of the *Laugh It Off* cases merely serves to give a full overview of the reasons why a trade mark could possibly not be enforced by a court. See sec 5.2.7 for a full discussion of the constitutional implications of the *Laugh It Off* cases.

¹⁵⁹ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

copyrights subject to renewal periods of ten years as well instead of a fixed term. However, trademarks are also less limited, since they are perpetual as long as someone is interested in renewing and using the trademark.

Trademarks are furthermore limited by way of what is allowed to be registered, similar to patents. However, similar to copyright, there are also certain defences against infringement that serve to limit trademark rights even further. It appears that trademarks are more limited in other ways to compensate for the fact that they are perpetual as long as they are renewed every ten years. If you follow the postulation that the strength of an intellectual property right is inversely proportional to the length of its duration,¹⁶⁰ then one may conclude that a trademark right would not be protected as strongly as patents, copyright or designs, which have a much shorter duration.

27 Conclusion

It becomes apparent from this discussion that it is useful to compare intellectual property to tangible property in order to describe intellectual property rights. Intellectual property rights are not connected to the tangible objects that are manufactured in terms of these rights and as such the intellectual property rights are not infringed if any of these objects are destroyed. Furthermore, intellectual property differs from tangible property in that it is not a scarce resource, but has to be made scarce artificially through legislation. Most of the rights connected to intellectual property are negative, entailing the right to prohibit persons from doing certain acts with the objects of intellectual property, for example copying and distributing them. Similar to other, tangible categories of property, intellectual property may also be characterised as a bundle of rights. Private law, in terms of legislation, grants certain (mainly negative) rights to the holder of the intellectual property that enable the holder to prevent third parties from utilising the exclusive rights pertaining to the intellectual property. Therefore the bundle of rights approach is particularly apt for intellectual property, since the property literally consists only of a bundle of rights because there is no tangible thing linked to the property concept.

It was argued in this chapter that the traditional immaterial property categories or intellectual property categories, namely copyright, patents, designs and trademarks are all *sui generis*

¹⁶⁰ Bainbridge DI *Intellectual Property* (1992) 12.

forms of property in private law. This is the case since the legislation creating these intellectual property forms acknowledges and protects it as property and this position is honoured in private law. This already implies that these interests might also be recognised and protected as property in constitutional law. Constitutional law generally employs a wider property concept than private law. The decision in *Laugh It Off v SAB International*¹⁶¹ strengthens this argument because of the Court's implicit acceptance that trademarks are constitutional property. This opens up the possibility of including the other intellectual property categories under the constitutional property clause by analogy. It has to be noted that it is

‘expected that the decision to include a certain property interest under the protective umbrella of the property clause will not guarantee actual protection, because a substantive weighing up of private property interests and the public interest could indicate that a particular deprivation or expropriation of property is justified’.¹⁶²

This explains the decision in *Laugh It Off v SAB International*¹⁶³ where the Court implicitly considered trademarks as constitutional property, but ultimately did not afford actual constitutional protection.

Therefore, the recognition of these traditional immaterial property interests as property for the purposes of the constitutional property clause would have the implication that these interests could be both protected and limited by the property clause. These interests would have to be considered and weighed up against other fundamental rights and would have to be given serious consideration in instances where these interests and other fundamental rights conflict.¹⁶⁴ The private law property rights granted in terms of intellectual property legislation are limited and not absolute; and since no fundamental right is unlimited, certain limitations would also be placed on the protection of these traditional immaterial property interests. The constitutional property clause makes specific provision for expropriation and deprivation of property, which would also be applicable to traditional immaterial property interests or intellectual property rights if they are recognised as a category of property. The two issues of

¹⁶¹ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a/ Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁶² Van der Walt AJ *Constitutional Property Law* (2005) 106.

¹⁶³ 2006 (1) SA 144 (CC).

¹⁶⁴ It has to be noted here that all constitutional rights are not equal. Rights such as the right to life, dignity and political rights are non-derogable, while property rights may be infringed or taken away in certain instances provided for in the constitutional property clause. However, the inclusion of intellectual property as constitutional property would have the effect that it would at least be considered equal to other property or economic rights.

protection and limitation have to be kept separate although they co-exist closely in the same sphere. These constitutional aspects will be discussed in more detail in Chapter 5 (Immaterial Property Interests in the Constitution).

It becomes apparent that these traditional categories of immaterial property, namely patents, copyright, designs and trademarks establish clearly defined rights, so that there should be no problem with the inclusion of these categories of immaterial property as constitutional property. Certain differences as well as common features are discernible in these traditional immaterial property or intellectual property interests. Each of the four intellectual property categories discussed in this chapter is created and governed by statute and as such may be seen as *sui generis* forms of property in private law. The term of private law protection differs for these intellectual property interests. Patents are protected for a period of 20 years and copyright for the lifetime of the author plus 50 years. An aesthetic registered design is protected for 15 years, while a functional design is protected for 10 years.

A trademark, on the other hand, is perpetual in principle. It may be renewed every 10 years provided that it remains distinctive and in use. If it is not renewed by means of the payment of a renewal fee, it may be scrapped from the register. As such it appears that patents, copyright and registered designs are limited by way of their duration, but not trademarks, at least in principle. If one assumes that the duration of an intellectual property right is inversely proportional to its power, then trademarks would not be protected as strongly as the other intellectual property rights, at least where it conflicts with other fundamental rights such as the right to dignity or freedom of expression. This may explain the result of *Laugh It Off v SAB International*,¹⁶⁵ where the court ultimately protected the right to freedom of expression above the property right in the trademark. In German constitutional law, the function of constitutional property protection is to guarantee the property institution and not every conceivable use of the property. For example in the case of copyright, what is protected by constitutional law is the essence of the copyright, namely the author's right (secured by private law) to have property in the creation.¹⁶⁶

¹⁶⁵ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a/ Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁶⁶ See Chap 5 (Immaterial Property Interests in the Constitution) for more examples from foreign law where intellectual property rights and other constitutional rights had to be weighed up. See especially German law (discussed in Sec 5.3.2 of Chap 5) and the Schoolbook case (*BVerfGE* 31, 229 [1971] (*Urheberrecht* case)) where the right to education and property rights in copyright had to be weighed up. See Kommers DP *The*

There are further limitations placed on each of the categories of intellectual property. Similar to tangible property, intellectual property rights are not absolute. The Patents Act¹⁶⁷ names specific inventions that are excluded from patentability, for example a discovery and a scientific theory. Copyright is further limited by way of exemptions from infringement, for example the fair dealing exemption or the provision regulating the reverse engineering of products. When the subject of copyright is used in line with one of these exemptions, the copyright will not be infringed. The Designs Act 195 of 1993 also allows only specific creations to be registered as designs, namely creations pertaining to the appearance of an article. In the case of trademarks, the Trade Marks Act¹⁶⁸ provides certain ‘absolute’ and ‘relative’ grounds for the refusal of a trademark, such as the case where a mark does not distinguish or where it is purely generic. Such trademarks may not be registered.

The purpose of intellectual property or traditional immaterial property interests is to provide a reward to persons for sharing their intellectual work. Furthermore it creates an incentive for further research. This is the general view, but there are questions regarding the effectiveness of this approach. Intellectual property may in fact stifle research if access to prior work is not readily available due to overly strict intellectual property protection. A balance must also be found between the level of reward or incentive and access to such intellectual works. The theories for the justification of intellectual property and unconventional immaterial property interests are further analysed and discussed in Chapter 4 (The Value of Immaterial Property). The specific purpose of a patent is supposedly reward and incentive, but the history of patents suggests that it was not the case. Similarly, with copyright the idea is to stimulate creativity. However, historically the first copyrights were granted not to authors, but to publishers. The intellectual property category of registered designs is relatively new and had been created to fill a void. These designs relate purely to the appearance of an article and cannot be registered as patents, but are also not suitable for copyright protection. A different type of protection is required, namely protection as registered designs. Trademarks were originally used to indicate the origin of goods. Later it also developed a distinguishing function, which is currently the most important motivation for the protection of trademarks.

Constitutional Jurisprudence of the Federal Republic of Germany (1997) 261-262 and Van der Walt AJ *Constitutional Property Clauses* (1999) 153.

¹⁶⁷ 57 of 1978 sec 52(2) (a)-(g).

¹⁶⁸ 194 of 1993 sec 10(2) and 10(4).

Before a specific interest becomes intellectual property, it has to comply with certain requirements. These requirements indicate that there may be social or economic justification for the protection of these immaterial property interests. Each category requires at least a certain amount of own effort in order to gain protection. It is sufficient to note here that the specific requirements of each intellectual property form give an indication as to the suitability of each theory for the justification of property protection in private law and perhaps also in constitutional law.

These requirements differ for each category. Patents¹⁶⁹ are required to be novel, involving an inventive step; and must have the ability to be used or applied in trade, industry or agriculture. Once these requirements are met, a patent may be registered. In order for copyright¹⁷⁰ to subsist, there must be an eligible work and a qualified person. The work must be original,¹⁷¹ must exist in a material form and be proper. Copyright, unlike a patent, exists automatically if the requirements are met. There is no need for registration. Registered designs¹⁷² must be produced by way of an industrial process and fulfil the requirements for either an aesthetic or a functional design. Similar to a patent, a design also needs to be registered before protection of the intellectual property right is granted. Similarly, a trademark¹⁷³ must also be registered before it is afforded any protection. Such a trademark is required to be distinctive and must be capable of graphic representation before it may be registered.

Furthermore, and perhaps most importantly, the holder of intellectual property (a patent, copyright, registered design or trademark) acquires certain rights pertaining to the object of the right. The owner of a patent has the exclusive right to make, use or import products embodying the invention and to prohibit unauthorised third parties from doing so. The most important right in the case of copyright is control of the different uses of the copyrighted work. Therefore, the owner has the right to do or authorise others to do specific acts relating to the work. The specific acts allowed depend on the category of the work in question. A registered design similarly confers upon the owner the right to prohibit third parties from manufacturing or importing an article that makes use of the design. In the case of a

¹⁶⁹ Governed by the Patents Act 57 of 1978.

¹⁷⁰ Governed by the Copyright Act 98 of 1978.

¹⁷¹ Originality is not the same as novelty for the purposes of a patent, it merely requires sufficient own effort.

¹⁷² Regulated by the Designs Act 195 of 1993.

¹⁷³ Regulated by the Trade Marks Act 194 of 1993.

trademark, the owner may prohibit third parties from infringing the trademark. Infringement occurs if a similar or identical mark may cause confusion or where the mark would be diluted due to the unauthorised use.

A common feature visible in all the rights granted for intellectual property is that the most important rights are negative rights, in other words the rights to prohibit other persons from doing certain acts in relation to a work. A person already has the right to utilise an intellectual creation, whether it is protected as intellectual property or not. The right to prohibit others from utilising it, however, is only acquired once the creation qualifies as intellectual property. It is necessary to note the difference between property protection in private law and constitutional law here again. The purpose of private law protection is to grant these rights to the full, protecting it against infringement by third parties. These rights are also capable of being protected under the constitutional property clause. The purpose of such protection is to guarantee the institution of intellectual property and to protect private interests against the state and against competing constitutional rights of other private parties. However, the constitutional property clause also serves to limit property rights and could therefore also limit intellectual property rights.

At this point it becomes necessary to define and discuss the unconventional immaterial property interests, in other words the two categories of interests which may be recognised as property in constitutional law, but not in private law; and interests not yet recognised in either constitutional or private law. These interests are defined in Chapter 3 (Unconventional Immaterial Property Interests). As mentioned, these interests are not generally accepted as property in private law, not even as *sui generis* forms, therefore its inclusion or exclusion will also have to be examined with reference to the reasons why it should be protected. First, however, it is necessary to define the unconventional immaterial property interests in order to compare it to traditional immaterial property.

Chapter 3: Unconventional Immaterial Property Interests

3.1 Introduction

In Chapter 2 (Traditional Immaterial Property Interests), the traditional immaterial property interests or intellectual property rights were discussed. These are respectively patents, copyright, designs and trademarks. Intellectual property rights are all *sui generis* forms of property in private law, since they have been created by legislation and private law honours this position. These intellectual property rights should readily be accepted as constitutional property as well, since constitutional law traditionally applies a wider property concept than private law. In principle, all forms of property in private law should be accepted as constitutional property as well. In *Laugh It Off v SAB International*,¹ the court implicitly accepted trademarks as constitutional property and the other intellectual property rights should also be included by analogy.

The *First Certification* case² dealt with the question whether intellectual property rights should be protected under a separate constitutional property clause. The Constitutional Court found that this is not necessary since the property clause is wide enough to include all property interests that should be protected according to international human rights standards. This is understood to mean that intellectual property rights may be protected under the property clause. The fact that no specific categories of property are mentioned means that any otherwise recognised property rights may be protected in principle, particularly since constitutional property law traditionally makes use of a wide property concept. Similarly, there is also scope to include immaterial property interests other than the traditional immaterial property interests or intellectual property rights discussed in Chapter 2 (Traditional Immaterial Property Interests).

Chapter 2 (Traditional Immaterial Property Interests) dealt with immaterial property interests created by way of legislation which grants property rule-type protection. The result is that these interests are also protected as property in private law. The question was whether the traditional immaterial property interests or intellectual property rights should also be

¹ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

² *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

recognised and protected as property in constitutional law. Since the constitutional concept is wide, it is not restricted to the private law concept of property, but it is acknowledged that property interests accepted as property for private law purposes would most likely also be protected under the constitutional property clause unless it is explicitly excluded.

In this chapter, which deals with the unconventional immaterial property interests, the question is different and not quite as straightforward. Some of the unconventional immaterial property interests are protected in private law, albeit not under property but another area of private law such as contractual rights, or in public law, such as socio-economic rights. Others are not protected in private or public law at all. However, all of these interests share certain characteristics such as economic value and scarcity with property and intellectual property and consequently it could be possible to recognise and protect them under the constitutional property clause. The question is whether, and if so in terms of which requirements, it would be possible to recognise and protect these unconventional immaterial property interests under the constitutional property clause. With the possible exception of public participatory rights which may be protected under the constitutional provisions for socio-economic rights, there is no constitutional provision other than the property clause that could provide adequate protection to these interests.

There has been no case law yet to clarify which of the unconventional immaterial property interests may be protected as constitutional property, although it is accepted that there is scope in the constitutional property concept to include any or all of these interests if it is found to be necessary. If these unconventional immaterial property interests are recognised as constitutional property, this would provide constitutional protection, but could also place limitations on the rights. The constitutional property clause does not only protect property, but also provides for the deprivation and expropriation of property. The question of why these unconventional immaterial property interests should be protected under the constitutional property clause and under which circumstances, is addressed in Chapter 4 (The Value of Immaterial Property).

Aside from the intellectual property rights or traditional immaterial property interests that are accepted as property in private law, there are also unconventional immaterial property

interests that are not generally accepted as property. Ciro³ argues that it has almost been a foregone conclusion that intellectual creation (traditional immaterial property interests) would be accepted as property. However, in a number of immaterial property areas the possible application of the property label has caused substantial disagreement. Ciro⁴ proposes that these areas incorporate commercial information, confidential information, trade secrets and digital copyright.⁵ Biotechnological products, traditional knowledge, commercial property, the so-called ‘new property’ or participatory claim rights and non-proprietary rights are further examples of unconventional immaterial property interests. There are also non-proprietary rights such as contractual claims that are not accepted as property in private law, but which may possibly enjoy constitutional protection because they are recognised and protected under other areas of private law and they arguably involve property-like patrimonial interests. These interests are examined in detail to determine which of its characteristics are similar to property and intellectual property.

However, there are more examples of unconventional immaterial property such as domain names,⁶ plant breeders’ rights,⁷ geographical indications⁸ and virtual property.⁹ There are currently debates about whether domain names should be protected under the existing

³ Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21.

⁴ Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21.

⁵ Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 7.

⁶ See Hurter E ‘The international domain name classification debate: are domain names ‘virtual property’, intellectual property, property, or not property at all?’ (2009) XLII *CILSA* 288-308, Alberts W ‘The new domain name dispute resolution structure’ (2007) 15 *JBL* 66-70 and Greenberg D & Kinstler E ‘The impact of ICANN’s new gTLD programme on trademark owners’ (2009) July *Without Prejudice* 26-27 for an introduction to the issues surrounding the protection of domain names.

⁷ See Collier D ‘Access to and control over plant genetic resources for food and agriculture in South and Southern Africa: How many wrongs before a right?’ (2006) 7 *Minn J L Sci & Tech* 529-564 and Gallo AA & Kesan JP ‘Property rights legislation in agricultural biotechnology: United States and Argentina’ (2006) 7 *Minn J L Sci & Tech* 565-598 for an overview of the challenges faced by the protection of plant breeders’ rights.

⁸ See Hughes J (moderator) & Beresford L, Kur A, Plevan K & Scafid S (panellists) ‘Symposium: Panel II: That’s a fine Chablis you’re not drinking: The proper place for geographical indications in trademark law’ (2007) 17 *Fordham Intell Prop Media & Ent LJ* 933-692, Kemp DJ & Forsythe LM ‘Trademarks and geographical indications: A case of California Champagne’ (2006) 10 *Chap LR* 257-978, Gangjee D ‘Geographical indications and trademarks: Quibbling siblings: Conflicts between trademarks and geographical indications’ (2007) 82 *Chi-Kent LR* 1253-1291 and Agdomar M ‘Removing the Greek from Feta and adding Korbel to Champagne: The paradox of geographical indications in international law’ (2008) 18 *Fordham Intell Prop Media & Ent LJ* 541-608 for an introduction to geographical indications and the debates about how these interests should be protected.

⁹ See Grimmelman J ‘Virtual worlds as comparative law’ (2004) 49 *NYL Sch LR* 147-184, Deenihan KE ‘Leave those Orcs alone: Property rights in virtual worlds’ (2008) *SSRN* 1-51 (Available at SSRN: <http://ssrn.com/abstract=1113402> (accessed 7 February 2011)), Fairfield JAT ‘Virtual property’ (2005) 85 *Boston ULR* 1047-1102, Lastowka FG & Hunter D ‘The laws of the virtual worlds’ (2004) 92 *California LR* 1-73 and Horovitz SJ ‘Competing Lockean claims to virtual property’ (2007) 20 *Harv JL & Tec* 443-458 for an introduction on the issues surrounding the protection of virtual property and the differing opinions as to the form of protection that is suitable and necessary.

intellectual property category of trademarks or separately. Plant breeders' rights is another form of problematic biotechnological inventions and there are many aspects that have to be taken into account when considering its protection, both in private law and constitutional law. Geographical indications are sometimes viewed as part of trademarks, but there are also debates around its protection. Virtual property is a particularly troublesome form of immaterial property, since certain interests may be protected as intellectual property, others under the law of contract and for yet others there are debates that the interests should be protected similar to tangible property in private law with the same property rule-type protection. There certainly could exist or emerge other unconventional immaterial property interests and it is impossible to discuss them all at length for purposes of this thesis, but the conclusions drawn for the unconventional interests discussed may certainly also inform the interests that are not discussed and perhaps even interests that have yet to emerge.

Certain of these immaterial property interests are not accepted as property in private law, but are or could be accepted as property in constitutional law. Other immaterial property interests are not accepted as property in either private law or constitutional law. However, certain of these interests receive strong protection in private law, but under areas of law other than property. For example, contractual rights such as debts and claim rights do enjoy strong protection in private law, only not as property rights but under the law of contract. A common characteristic of all of the unconventional immaterial interests is that they are similar to property interests in that they have patrimonial value.

Commercial information is not protected as property under private law and also not under any other area of private law. However, there may be scope to include it under the property clause, at least in the instances where the resource is viewed as excludable. The rights of a holder of confidential information are not protected as property in private law, but under the law of obligations. However, they could possibly be included as constitutional property. Trade secrets are a *species* of the *genus* confidential information and specific requirements for its existence have crystallised from case law. It has also been proposed that trade secrets should be categorised as a *sui generis* form of property in private law, similar to the intellectual property categories. Consequently trade secrets could most likely also be protected as constitutional property.

Digital copyright is more problematic, since it is currently protected as property under copyright, but not adequately. Therefore the law of contract is also being used to protect the rights of owners of digital copyright works. However, this does not necessarily mean that it would not be protected under the constitutional property clause, since a wide property definition is traditionally employed in constitutional law. Biotechnological products are also particularly troublesome, since some of these products may be protected under patents, but others not. There are also other constitutional rights that could challenge the constitutional protection of these biotechnological products if they were to be afforded protection. Rights such as the right to healthcare, bodily integrity and privacy are particularly important in this area.¹⁰

Traditional knowledge is currently in the process of being integrated into the existing intellectual property categories under South African private law, but there is still some uncertainty about the viability of this approach. There is already limited protection for traditional knowledge under patents, but all other forms of traditional knowledge are currently unprotected. If the so-called ‘Traditional Knowledge Bill’ of 2007¹¹ for the adaptation of existing intellectual property categories is passed, traditional knowledge will be protected as property in South African private law and then in principle also as constitutional property. There is also the possibility of protecting traditional knowledge under cultural rights, although this would not provide for the monetary remuneration sought by the holders of traditional knowledge.

Commercial property includes debts and claims; shares; goodwill; and state-granted licenses, permits and quotas. Although these interests may broadly be categorised as commercial property, not all of these interests are treated the same. Some of these immaterial property interests are protected under private law, but not under property in private law. They could still be treated as constitutional property and this is done in many foreign jurisdictions. Participatory claims are also not protected as property under private law; and in South African law at least they would most likely not be protected under constitutional property law either, since there are other constitutional rights that protect socio-economic rights. Finally, non-proprietary claims are not traditionally considered to be property in private law, but

¹⁰ See p 1-2, especially fn 6.

¹¹ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

could possibly be protected under the property clause. The aim of this chapter is to set out the specific rights or interests in each unconventional immaterial property category and to determine whether it could be included under the constitutional property clause. The reasons why each category should be protected will be discussed in more detail under Chapter 4 (The Value of Immaterial Property).

3 2 Commercial Information

In *International News Service v Associated Press*¹² the United States Supreme Court was faced with the problem of propertising a non-scarce resource.¹³ INS (the plaintiff) sought to prevent Associated Press (the defendant) from obtaining and using news posted on their bulletin boards. The defendant distributed these news items through their news services. The plaintiff argued that the news items were valuable property, since they had spent money, time and effort to obtain news items from the war. The defendant argued that news was published and as such common property, since it was free to be used by any member from the public. They argued that anyone was free to use the news for any purpose and therefore also for profit. The court held that information that had been gathered about events of public interest could not be owned in the absolute sense. The public was free to use the information and in that sense it was 'common property'. However, the gatherer of the information had the right to restrain rivals from using the news commercially. Between those two parties the news must be regarded as 'quasi-property' and this situation may be regulated by the law of unfair competition.

On the other hand, *Sports & General Press v 'Our Dogs' Publishing Co*¹⁴ is an English case generally cited for the argument that there can be no ownership in commercial information. The facts of the case originate from the promotion of a dog show on leased land by the Ladies Kennel Club. The exclusive rights to take photographs of the show had been assigned by the Club. A freelance photographer, employed by the defendants, took photos of the show. The plaintiff sought to prevent the defendants from publishing the photos taken by the freelance photographer. The court of first instance as well as the Court of Appeal viewed the case with regard to issues of control connected to the ownership of the land. Since the plaintiffs did not have the power to prevent anyone from taking pictures on the premises, there could also be

¹² 248 US 215 (1918). Also see Baird DG 'Common law intellectual property and the legacy of *International News Service v Associated Press*' (1983) 50 *U Chi LR* 411-429 for a full discussion of the case.

¹³ See Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 7-8.

¹⁴ [1916] 2 KB 880.

no proprietary right to take photographs. The court had not considered whether information about the show in the form of photographs might enjoy limited protection against competitors.¹⁵

In *Victoria Park Racing v Taylor*¹⁶ the Australian High Court had to consider the issue of the radio broadcasting of live commentaries of horse races by a commentator standing on an observation platform on a neighbour's land. The platform had been erected especially for this purpose. The racecourse and the boards displaying information about the races were visible from the platform. The court found that no legal right of the racecourse owners had been infringed by this broadcast. The court decided the case on the principles of nuisance. Therefore any power to control such broadcasts would have to be an incident of ownership of the land in order for there to be an enforceable right. The court also noted that the racecourse owner cannot prevent neighbours from watching the races and that there cannot be property in a spectacle. Ciro¹⁷ argues that the plaintiff had actually sought to prevent commercial competitors from using the information for profit and in this regard the claim was similar to the United States case of *International News Service v Associated Press*.¹⁸ The argument that information may be regarded as 'quasi-property' was rejected by the Australian High Court on conceptual grounds. Only the minority of the court saw the matter as one of unfair competition by the defendants.

Gray¹⁹ states that in *Victoria Park Racing v Taylor*²⁰ there is no doubt that the defendant exploited a commercial opportunity. They had not done anything to create the opportunity, but made a profit from horseracing enthusiasts who would have paid the plaintiff, had it not been for the defendant's actions. Gray states that something had certainly been taken from the plaintiff by the defendant. The question that remained to be answered was whether that which had been taken may be termed property. It was on this question that the majority and minority of the court were divided by their contradictory views of what property is. The minority spoke of misappropriation by the defendant of the plaintiff's profitable enjoyment of the land for commercial use. The majority denied that there had been any misappropriation or

¹⁵ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 8.

¹⁶ (1937) 58 CLR 479.

¹⁷ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 8.

¹⁸ 248 US 215 (1918).

¹⁹ Gray K 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307 at 266-267.

²⁰ (1937) 58 CLR 479.

deprivation of any vested legal entitlement. Furthermore, Gray²¹ states that the ‘excludability’ of a resource is a determinant of whether it may be termed property. The majority of the court in *Victoria Park Racing v Taylor*²² decided the case on the basis of whether the resource was excludable or not although they did not say so explicitly.²³

According to Gray,²⁴ a resource may be non-excludable on physical, legal and moral grounds. A resource is physically non-excludable if it is impossible or not reasonably practical to exclude strangers from a particular resource in the form that it exists.²⁵ A legally non-excludable resource²⁶ entails that a resource does not enjoy legal protection, either by means such as the adoption of a contract²⁷ or by the utilisation of intellectual property²⁸ protection. Where such available legal protection was not implemented, a resource may be deemed legally non-excludable. Gray states that *Sports & General Press v ‘Our Dogs’ Publishing Co*²⁹ would be an example where the legal protection of a contract may have been used to prohibit persons to take photos on the premises. Since the plaintiff had not done so, the resource (the assignment of the right to take photos) was deemed legally non-excludable by the court.

The final ground for non-excludability is where resources are morally non-excludable.³⁰ This ground connects closely to the normative considerations that govern the commons. Where resources are so integral to social vitality, such resources should be left in the commons and to do otherwise would be *contra bonos mores*.³¹ Gray argues that in this ground for non-excludability ‘the law of property most closely approaches the law of human rights’.³² In this category, the social and economic concerns frequently relate to ‘freedoms of speech, belief, association, assembly and movement’.³³ It becomes clear from this analysis that there are many considerations that need to be weighed up before a conclusion may be reached about

²¹ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 266-268.

²² (1937) 58 CLR 479.

²³ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 268-269.

²⁴ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 269.

²⁵ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 269-273.

²⁶ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 273-274.

²⁷ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 274-276.

²⁸ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 276.

²⁹ [1916] 2 KB 880.

³⁰ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 280-283.

³¹ In Chap 4 (The Value of Immaterial Property), the commons is discussed in more detail with a particular focus on the intellectual property commons or so-called public domain.

³² Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 281.

³³ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 283.

whether commercial information may be regarded as property. It appears from this analysis that commercial information could only be regarded as property if it is possible to exclude persons from obtaining that information, either by contract or by utilising a statute.

Commercial information is not included under any private law property category. However, there could be scope for commercial information to be protected under the constitutional property clause under certain conditions. If the use of such information may be excluded from the general public, in line with one of the categories of ‘excludability’ as identified by Gray,³⁴ then it should be possible to include such an immaterial property interest under the scope of the constitutional property concept. It is not possible to protect commercial information under the intellectual property category of copyright, since there may be no copyright in ideas. The only possibility would most likely be to gain excludability through contractual protection. Commercial information arguably involves property-like patrimonial interests and may be protected under private law albeit in the area of the law of contract and not property. Consequently it is possible that commercial information may be recognised and protected as property under the South African constitutional property clause.

3.3 Confidential Information

The question of whether confidential information may be treated as property usually originates from the situation where a fiduciary obtains a profit from the information they hold in the position as a fiduciary. The central question is usually whether the person is entitled to keep the fruits gained from their wrongdoing.³⁵ In *Boardman v Phillips*³⁶ a solicitor obtained commercially sensitive information and used it to purchase shares of a private company. A profit was made from the purchase of these shares. The court held that the profit made was to be held on account to the beneficiary and the solicitor was only entitled to payment for his work and skill.

*SEC v Materia*³⁷ is an ‘insider trading’ case where the court acknowledged that secret information may be worth a fortune in the world of high finance, but worthless once revealed. Materia worked for Bowne of New York City, Inc; a financial printer. He worked as a

³⁴ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307.

³⁵ Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 11. See Stuckey JE ‘The equitable action for breach of confidence: Is information ever property?’ (1980-1982) 9 *Sydney LR* 402-433 in general, where she argues that confidential information is never property.

³⁶ [1967] 2 AC 46.

³⁷ 745 F2d 197 (1984).

copyholder and had to read documents to a proof reader who checked its accuracy. The documents were about a forthcoming tender offer and even though the names of the companies were erased, Materia was able to work out the target. He used publicly available information on the company in order to determine the target company. Materia invested in the target company and made considerable profit selling the shares after the offer had been made public. The central question in this case is to determine when a person may profit from important non-public information. The court answered this question with reference to misappropriation of non-public information. According to the court, Materia breached a fiduciary duty by trading on the confidential information for his own gain.³⁸ This misappropriation violated the United States' Securities Exchange Act.³⁹

Boyle⁴⁰ names certain criticisms of the current trend of prohibiting insider trading, for example that insider trading is consistent with other norms in society; that insider trading injures no one; that insider trading is not possible in an efficient market; and that if corporations believed it to be harmful, they would regulate insider trading themselves.⁴¹ Boyle⁴² states that there certainly is something counter-intuitive about the prohibition of insider trading.

In South Africa, the Securities Services Act 36 of 2004 has repealed the Insider Trading Act 135 of 1998. The Securities Services Act 36 of 2004 governs, among others, the civil and criminal liability for insider trading which had previously been governed by the Insider Trading Act 135 of 1998. Jooste⁴³ describes the working of Chapter III of the Securities Services Act 36 of 2004 as imposing 'liability on "insiders" who, knowing they have "insider information" relating to particular securities, deal in such securities (for their or someone else's account), disclose the "insider information" to others, encourage others to deal in such securities or discourage others from dealing in such securities'. The aim of such legislation is to curb insider trading and also to provide compensation for the victims of insider trading. In other words, confidential information receives protection in private law, but under the law of

³⁸ *SEC v Materia* 745 F2d 197 (1984) 203.

³⁹ 1934 sec 10(b) and Rule 10(b)-5.

⁴⁰ Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 83.

⁴¹ See Hetherington JAC 'Insider trading and the logic of the law' (1967) 1967 *Wis LR* 720-737 at 720 and Dooley M 'Enforcement of insider trading restrictions' (1980) 66 *Va LR* 1-84 at 37-44.

⁴² Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 83.

⁴³ Jooste R 'A critique of the insider trading provisions of the 2004 Securities Services Act' (2006) 123 *SALJ* 437-460 at 437.

obligations and not under the law of property. Jooste⁴⁴ notes some flaws in the new Securities Services Act 36 of 2004. For the purposes of this chapter, the most important flaw is that the Securities Services Act 36 of 2004 provides no remedy to the creators of such inside information.⁴⁵

Such a remedy to corporate or institutional creators of information was also absent from the Insider Trading Act 135 of 1998. According to Osode⁴⁶ there are important reasons why such an omission may not be excused. In the first instance, inside information generally takes the form of intangible property which is developed with the purpose of making a profit. Its use by both insiders and non-insiders may be described as something analogous to theft. The second reason pertains to the law and economics theory of insider trading based on property rights. The theory holds that corporate private sector investment would be discouraged if such information were not protected by some statutory right of recovery. Finally, Osode⁴⁷ notes that even though it is difficult to show the actual loss sustained in insider trading cases, corporate entities suffer most from such insider trading incidents.

In Australia, the Corporation Act of 2001⁴⁸ makes provision for a corporation that had been the victim of insider trading to recover their losses, calculated as the difference between the price for which the securities had been sold and the price at which it could have been sold had it not been for the insider trading. Therefore the question of information as property has two sides in the context of insider trading. In the first instance the question is whether the person trading on such inside information may have property in such profits made. The second question pertains to the protection of the company that owns the inside or confidential information and whether such protection should take the form of property protection.

In the case of a person making profits from the use of confidential information, the interest in the information would not be protected since it is prohibited as insider trading. Therefore such an interest in confidential information would not be protected as a category of property

⁴⁴ Jooste R 'A critique of the insider trading provisions of the 2004 Securities Services Act' (2006) 123 *SALJ* 437-460 at 438-460.

⁴⁵ Jooste R 'A critique of the insider trading provisions of the 2004 Securities Services Act' (2006) 123 *SALJ* 437-460 at 458-459.

⁴⁶ Osode PC 'The new South African Insider Trading Act: Sound law reform or legislative overkill?' (2000) 4 *J African L* 239-263 at 254-255.

⁴⁷ Osode PC 'The new South African Insider Trading Act: Sound law reform or legislative overkill?' (2000) 4 *J African L* 239-263 at 254-255.

⁴⁸ Sec 1043L(2), sec 1043L(5) and sec 1043L(6).

in private law, much less in constitutional law. Whether the interests of the owner of the confidential information should and could be protected as property is another matter. The interests are protected under private law, albeit not under property law, but under the law of obligations. However, there are arguments that the current statute governing confidential information and insider trading, namely the Securities Services Act 36 of 2004, does not provide adequate protection of such interests, although this question falls outside of the scope of this dissertation. Perhaps it would be prudent for the South African legislature to address this deficit in future legislation. The misappropriation of these interests by third parties may usually be excluded by way of legislation prohibiting insider trading and as such any unauthorised use of the information usually takes place after the information was ‘stolen’. It should be possible to protect these interests under the constitutional property clause since they are viewed as being excludable and meant to be kept confidential.⁴⁹ Confidential information arguably involves property-like patrimonial interests that could be protected under the property clause. It could be argued that the state may have a constitutional duty to provide property rule-type protection or some other form of protection for these patrimonial interests in commercial information, potentially by way of legislation.

3 4 Trade Secrets

According to Domanski, ‘trade secrets, know-how and other intangibles covering technical and commercial information are substantial economic assets’.⁵⁰ He examines the legal protection of trade secrets in South Africa and states that the protection of trade secrets falls almost entirely under common law, although statutory law may also play a role. He emphasises that a trade secret is a *species* of the *genus* confidential information.⁵¹

Neethling describes a trade secret as ‘trade, business or industrial information belonging to a person (usually an entrepreneur), which has a particular economic value and is not generally available to and therefore known by others’.⁵² He states that a trade secret represents a valuable economic interest that deserves legal protection. He argues that the view of a trade secret as intellectual property currently enjoys considerable support, since it is an

⁴⁹ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307.

⁵⁰ Domanski A ‘Trade secrets through the cases: A study of the basis and scope of protection’ (1993) 56 *THRHR* 229-242 at 229.

⁵¹ Domanski A ‘Trade secrets through the cases: A study of the basis and scope of protection’ (1993) 56 *THRHR* 229-242 at 231.

⁵² Neethling J *Van Heerden-Neethling Unlawful Competition* (2nd ed 2008) 213.

‘incorporeal product of the human mind embodied in a tangible agent’.⁵³ According to Neethling,⁵⁴ a trade secret serves as the object of an independent immaterial property right. In *Harcris Heat Treatment (Pty) Ltd v Iscor*⁵⁵ the court stated that the confidential information at issue was the intellectual property that belonged to the plaintiff. As a consequence, the owner of the trade secret had the right to exploit it. This may be used as authority that trade secrets are immaterial property. On this authority alone it may be argued that the interest in trade secrets is a *sui generis* form of property in private law and should consequently also be included as constitutional property.

According to Neethling⁵⁶ there are three requirements that must be satisfied before information may qualify as a trade secret.⁵⁷ In the first place the information must be capable of application in trade or industry.⁵⁸ Secondly the information needs to be secret or confidential.⁵⁹ Therefore the information must be available only to a restricted number of people and this must be objectively determined. Thirdly, objectively viewed, the information must be of economic (business) value to the owner of the information.⁶⁰ Neethling⁶¹ argues that the nature of the business information that may be the subject of a trade secret is irrelevant. As long as the requirements are met, any type of information may qualify as a trade secret. The courts have generally accepted two broad types of trade secrets, namely technical information and business and marketing information. Types of information that the courts have accepted as trade secrets are a technical process;⁶² computer software;⁶³ the

⁵³ Neethling *J Van Heerden-Neethling Unlawful Competition* (2nd ed 2008) 213. Also see Lemley MA ‘The surprising virtues of treating trade secrets as IP rights’ (2008) 61 *Stan LR* 311-353 where he argues that trade secrets should be regarded as a form of intellectual property, although not as a form of traditional property. It should be noted that intellectual property is accepted as property in private law under South African law and that this should be distinguished from the position in the United States of America.

⁵⁴ Neethling *J Van Heerden-Neethling Unlawful Competition* (2nd ed 2008) 213-314.

⁵⁵ 1983 (1) SA 548 (T) 555.

⁵⁶ Neethling *J Van Heerden-Neethling Unlawful Competition* (2nd ed 2008) 214-216.

⁵⁷ Also see Neethling J ‘Requirements for the protection of confidential trade information or trade secrets’ (2003) 120 *SALJ* 472-477.

⁵⁸ See for example *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) 53-54, *Motion Transfer & Precision Roll Grinding CC v Carsten* [1998] 4 All SA 168 (N) 175 and *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W) 623.

⁵⁹ See for example *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) 53-54, *Motion Transfer & Precision Roll Grinding CC v Carsten* [1998] 4 All SA 168 (N) 175 and *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W) 623.

⁶⁰ See for example *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) 53-54, *Motion Transfer & Precision Roll Grinding CC v Carsten* [1998] 4 All SA 168 (N) 175 and *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W) 623.

⁶¹ Neethling *J Van Heerden-Neethling Unlawful Competition* (2nd ed 2008) 217.

⁶² *Harcris Heat Treatment (Pty) Ltd v Iscor* 1983 (1) SA 548 (T), *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) 322 and *Meter Systems Holdings Ltd v Venter* 1993 (1) SA 409 (W) 429-430.

⁶³ *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 (4) SA 123 (C).

know-how of an undertaking;⁶⁴ an unpublished trademark;⁶⁵ customer lists;⁶⁶ customer connections;⁶⁷ business conversations;⁶⁸ credit records;⁶⁹ price lists;⁷⁰ and tender prices.⁷¹

Knobel⁷² argues that trade secrets are the objects of independent subjective rights. The doctrine of subjective rights states that people are the holders of subjective rights. The holder of such a subjective right has a right to something. This right is enforceable against other people.⁷³ As such there is a relationship between the holder of the right and the legal object. There is also a relationship between the holder of the right and other people. There are four categories of subjective rights, classified according to the legal objects to which they are relevant. These are real rights pertaining to things; personality rights pertaining to good name, privacy etcetera; personal rights pertaining to performances based on contract or delict; and intellectual (immaterial) property rights pertaining to intangible products of the human mind outside the creator's personality.⁷⁴ A new category, personal immaterial property rights pertaining to intangible products of the human mind connected to the personality of the creator, has been proposed. In order to qualify for protection as a subjective right, an interest must be of value and must also be susceptible to human control.⁷⁵

As examples of the diverse range of trade secrets the courts have protected, Knobel⁷⁶ mentions information relating to or contained in: a manufacturing process, a furnace for the heat treatment of metals, computer software, an unpublished trademark, credit records and

⁶⁴ *Harcris Heat Treatment (Pty) Ltd v Iscor* 1983 (1) SA 548 (T) 551, *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 189-192, 194-195 and *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) 324, 326.

⁶⁵ *Meter System Holdings Ltd v Venter* 1993 (1) SA 409 (W) 429.

⁶⁶ *Van Castricum v Theunissen* 1993 (2) SA 726 (T) 735 and *Meter System Holdings Ltd v Venter* 1993 (1) SA 409 (W) 428.

⁶⁷ *Knox D'Acry Ltd v Jamieson* 1992 (3) SA 520 (W) (confirmed on appeal in *Knox D'Acry Ltd v Jamieson* 1996 (4) SA 348 (A)).

⁶⁸ *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W).

⁶⁹ *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C).

⁷⁰ *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) 870.

⁷¹ *Sibex Constructions (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) 64 and *Meter System Holdings Ltd v Venter* 1993 (1) SA 409 (W) 430.

⁷² Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 575.

⁷³ Van Heerden HJO & Neethling J *Unlawful Competition* (1995) 80. Also see Neethling J Van Heerden-Neethling *Unlawful Competition* (2nd ed 2008) 89-91.

⁷⁴ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 575.

⁷⁵ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 576.

⁷⁶ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 583.

customer lists.⁷⁷ The elements of a trade secret that may be protected by law has been distilled from case law.⁷⁸ These elements are: information;⁷⁹ commercial or industrial applicability;⁸⁰ secrecy;⁸¹ the owner's will to maintain secrecy;⁸² economic value;⁸³ and concreteness or potential concreteness.⁸⁴ According to the first element, a trade secret must consist of information. The term 'trade secret' is frequently used as a *species* of the wider concept of 'confidential information'. In the second place, a trade secret must be capable of industrial or commercial application. This requirement is often described as being self-evident.⁸⁵

The third requirement, secrecy, is often examined in case law. South African courts have followed English precedents that interpret confidential information as information not in the public domain.⁸⁶ 'It must not be something that is public property or public knowledge', as courts and authors often state.⁸⁷ The concept of secrecy as used by the courts is relative and not absolute. Secrecy is acknowledged in a case where the information can be produced by someone who obtains the secret by taking the same labour, time and effort as the owner of the secret information.⁸⁸ Secrecy is not necessarily destroyed if some competitors of the trade

⁷⁷ See *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 (1) SA 548 (T), *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) 322, *Meter Systems Holdings Ltd v Venter* 1993 (1) SA 409 (W) 429-430, *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 (4) SA 123 (C), *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 189-192, 194-195, *Van Castricum v Theunissen* 1993 (2) SA 726 (T) 735, *Knox D'Acry Ltd v Jamieson* 1992 (3) SA 520 (W) (Confirmed on appeal in *Knox D'Acry Ltd v Jamieson* 1996 (4) SA 348 (A)). Also see *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W), *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C), *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) 870 and *Sibex Constructions (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) 64.

⁷⁸ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 583-589.

⁷⁹ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 584. Also see Domanski A 'Trade secrets through the cases: A study of the basis and scope of protection' (1993) 56 *THRHR* 229-242 at 232.

⁸⁰ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 584.

⁸¹ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 584-585.

⁸² Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 586-587.

⁸³ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 587-588.

⁸⁴ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 588.

⁸⁵ Van Heerden HJO and Neethling J *Unlawful Competition* (1995) 225. Also see Neethling J Van Heerden-Neethling *Unlawful Competition* (2nd ed 2008) 215.

⁸⁶ See *Schultz v Butt* 1986 (3) SA 667 (A) 680 and *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 194.

⁸⁷ This phrase originates from the English case of *Saltman Engineering Co Ltd v Campbell Engineering Ltd* [1948] 65 RPC 203 215. See also Bainbridge DI *Intellectual Property* (1992) 287 and Cornish WR *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th ed 1999) 307.

⁸⁸ See *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) 323-326, *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 191-192, *Harchris Heat Treatment v Iscor* 1983 (1) SA 548 (T) 550-551 and *Van Castricum v Theunissen* 1993 (2) SA 726 (T) 734-735.

secret owner also have the information.⁸⁹ Knobel also states that secrecy will be maintained if the information is not readily available to everyone.⁹⁰ From the way that courts inquire into secrecy, it appears that secrecy must be objectively determined.⁹¹

In the fourth place, the owner of confidential information must have the will to maintain secrecy of the information. Only then will a trade secret qualify for legal protection. In most cases this requirement focuses on the steps taken by the owner to safeguard secrecy. Therefore the inquiry is whether such steps were taken or not.⁹² This links with the idea that an owner must take all available steps to ensure excludability of a property interest and if these were taken, property protection should be afforded.⁹³ Some cases focus on the subjective will of an owner to preserve secrecy.⁹⁴ In practice, a defendant or respondent may allege absence of a will to maintain secrecy of the information, consequently the requirement of secrecy may be employed negatively.⁹⁵

The fifth requirement for the protection of a trade secret is economic value.⁹⁶ It must be objectively determined whether the trade secret is of economic value.⁹⁷ Sometimes the value to the owner is used and sometimes the value to the competitor, but this does not make a big practical difference. Economic value is not a determinant of secrecy, but a separate element of a trade secret protected by law, as Knobel⁹⁸ argues.

In the final instance, a trade secret must also be concrete or potentially concrete, since a trade secret can be protected by law only if it can exist separate from the personality of its owner.⁹⁹ There is no requirement in case law that a trade secret should be reduced to a material form in order to qualify for protection; and as a result mere potential concreteness is sufficient.

⁸⁹ *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T) 502.

⁹⁰ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 585.

⁹¹ See *Schultz v Butt* 1986 3 SA 667 (A) 680. In *Van Castricum v Theunissen* 1993 (2) SA 726 (T) 732 the court expressly stated that the test employed is objective.

⁹² See for example *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (T) 154.

⁹³ Gray K 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307.

⁹⁴ See for example *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) 325.

⁹⁵ See for example *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 (4) SA 123 (C) 126.

⁹⁶ See *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) 325 and *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 (1) SA 673 (O) 692.

⁹⁷ See *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 (1) SA 686 (W) 689 and *Van Castricum v Theunissen* 1993 (2) SA 726 (T) 732.

⁹⁸ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 588.

⁹⁹ Knobel JC 'Trade secrets and the doctrine of subjective rights' (2001) 64 *THRHR* 572-595 at 588.

Knobel¹⁰⁰ concludes that a trade secret may be protected in South African law. He defines a trade secret broadly as ‘secret information which is capable of commercial or industrial application, which the owner has the will to keep secret, which has economic value, and which can lead an existence separate from its owner’.¹⁰¹

Furthermore, Knobel¹⁰² asks whether trade secrets may be the objects of subjective rights. He concludes that they may, since they are of economic value and enjoy the quality of scarceness. Secondly, trade secrets possess the qualities of independence, distinctness and definiteness to be capable of use, enjoyment and disposal. Knobel states that if subjective rights to trade secrets are recognised, these subjective rights may be classified as intellectual property.¹⁰³ He argues that a trade secret is ‘an intangible product of the human mind and endeavour which can be expressed in an outwardly perceptible form’ and as such complies with the concept of intellectual property.¹⁰⁴

Intellectual property may be defined as ‘the intangible products of human skills, or the inventions of the human mind, situated outside the personality of the author and which are protected by the legal order’.¹⁰⁵ Knobel argues that there seems to be no reason why a trade secret should not be recognised as a non-statutory intellectual property right. He adds that the law of trade secrets is often discussed in treatises on intellectual property law. In the alternative, he explores the possibility of including trade secrets under the right to goodwill, thereby negating the need for a separate right to trade secrets. In a majority of cases, the infringement of a trade secret will also infringe goodwill, but the converse is not necessarily always true. It is quite possible that a trade secret may be infringed without the goodwill of a business being affected. Knobel gives the example of an inventor who intends to sell his secret to an entrepreneur instead of using it himself. If a third person obtains access to the secret without permission, there is no unlawful competition or infringement of goodwill. In such a case it would be more satisfactory to base wrongfulness on the infringement of a subjective right of which the trade secret is the object.¹⁰⁶

¹⁰⁰ Knobel JC ‘Trade secrets and the doctrine of subjective rights’ (2001) 64 *THRHR* 572-595 at 589.

¹⁰¹ Knobel JC ‘Trade secrets and the doctrine of subjective rights’ (2001) 64 *THRHR* 572-595 at 589.

¹⁰² Knobel JC ‘Trade secrets and the doctrine of subjective rights’ (2001) 64 *THRHR* 572-595 at 589.

¹⁰³ Knobel JC ‘Trade secrets and the doctrine of subjective rights’ (2001) 64 *THRHR* 572-595 at 590.

¹⁰⁴ Knobel JC ‘Trade secrets and the doctrine of subjective rights’ (2001) 64 *THRHR* 572-595 at 590.

¹⁰⁵ Knobel JC ‘Trade secrets and the doctrine of subjective rights’ (2001) 64 *THRHR* 572-595 at 590. Also see Domanski A ‘The nature of the right infringed in cases of unlawful competition in South African law’ (1993) 5 *SA Merc LJ* 127-143 at 128.

¹⁰⁶ Knobel JC ‘Trade secrets and the doctrine of subjective rights’ (2001) 64 *THRHR* 572-595 at 591-592.

From case law as well as the opinions of the authors discussed, it seems that there should be no problem to include trade secrets as property for the purposes of private law protection, since they may be treated as the objects of subjective rights. Certain specific requirements have to be fulfilled before information may be termed a trade secret. Once these requirements are met, it should be possible to extend private law property protection to trade secrets. It may even be argued that trade secrets should be viewed as a sub-category of intellectual property, similar to patents or works of copyright. In the United Kingdom and the United States of America, for example, trade secrets are treated as intellectual property and discussed in the same works dealing with other intellectual property forms.¹⁰⁷ As is argued in Chapter 2 (Traditional Immaterial Property Interests), property interests recognised in private law may also be included under the constitutional property clause. Consequently it should not be problematic to recognise and protect trade secrets under the scope of the constitutional property concept.¹⁰⁸

3 5 Digital Copyright

Digital technologies pose challenges to the regulation of intellectual property, more specifically copyright.¹⁰⁹ Tensions between the enforcement of private property rights and the free and unrestrained distribution of information on the internet are caused by anti-circumvention devices used by copyright owners.¹¹⁰ Pistorius describes the internet as ‘a major global data pipeline through which large amounts of “locked” intellectual property and

¹⁰⁷ See Vandeveldt KJ ‘The new property of the nineteenth century: The development of the modern concept of property’ (1980) 29 *Buffalo LR* 325-367 at 348-354. Also see Bainbridge DI *Intellectual Property* (1992) and Cornish WR *Intellectual property: Patents, Copyright, Trademarks and Allied Rights* (4th ed 1999) in general.

¹⁰⁸ Specific reasons for the protection of different immaterial property interests are discussed in Chap 4 (The Value of Immaterial Property).

¹⁰⁹ Although copyright naturally applies in the digital environment, there are certain aspects of the digital environment that cause the enforcement of copyright to be problematic and this needs to be explored and improved if it is found to be necessary. The referral to immaterial property interests pertains to the aspects of copyright works that do not enjoy adequate protection where copyright remedies are applied in the digital environment. This is also the reason why it is necessary to refer to property interests that are not protected as property in private law separately from the property rights that are already protected in private law. These interests may possibly still enjoy constitutional property protection and in light of this the legislator may be obliged to make the necessary changes to existing legislation in order to provide the required property protection in private law.

¹¹⁰ Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 12. Also see Moloney LJ ‘The internet: Demise of intellectual property law?’ 1997 *TSAR* 566-570 where she highlights some of the challenges that the internet poses to existing intellectual property categories and stresses the importance of protecting intellectual creations in the area of the internet.

proprietary information are moved'.¹¹¹ She notes that earlier technologies such as taping and photocopying allowed individual consumers to copy works mechanically. This was done in limited quantities; the copies required investment and time; and the copies were of poor quality relative to copies distributed via the internet. Such copies made by taping or photocopying also required the person making the copies to be in the same physical place as the work being copied. This may be contrasted with the internet, where any number of copies can be made in almost no time. The quality of each copy also stays the same where copies are distributed via the internet. Accordingly the internet has transformed the industry of copying.¹¹²

Pistorius¹¹³ states that digital technology combined with the internet create opportunities and also pose threats to intellectual property interests of both the public and private intellectual property right holders. Private holders have the opportunities created by a global market as well as a broader scope of exposure for authors. However, alongside these opportunities there also exist the dangers that works may be distributed all over the web and that the works may be adapted without authorisation. The public, on the other hand, has the advantage of basically unlimited access to works from authors around the globe. Yet this same situation also leads to intellectual property holders protecting their works more stringently by means of legal and technological devices. This in turn allows the holders of the rights to determine when and how the works may be accessed and by whom. The other danger posed to public users is legislation. When confronted with new technologies, legislators often propose legislation that is too narrow and technology-specific.¹¹⁴

Holders of intellectual property rights progressively protect their property by means of technological systems such as 'anti-copy devices, access control, electronic envelopes, proprietary viewer software, encryption, passwords, watermarking, fingerprinting (user

¹¹¹ Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 1. Also see Ryan M 'Cyberspace as public space: A public trust paradigm for copyright in a digital world' (2000) 79 *Or LR* 647-720 in general and specifically at 647 where she describes the increased privatisation of information in cyberspace and argues that 'such information is inherently public property and, as such, its management through copyright policy is subject to the same public trust principles that have operated as a check on the privatization of other types of public resources'.

¹¹² Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 1.

¹¹³ Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 1-2.

¹¹⁴ Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 12 *PER* 1-27 at 1-2.

authentication), metering and monitoring of usage and remuneration systems'.¹¹⁵ The World Intellectual Property Organisation (WIPO) Copyright Treaty¹¹⁶ enforces this approach of protection by means of technological systems. The WIPO Copyright Treaty (the Treaty) makes provision for the protection of technological protection devices used on copyrighted works. Parties to the Treaty are required to provide sufficient legal protection and remedies to prevent persons from circumventing these technological protection systems. The Treaty maintains the balance between private copyright and rights of the public to access the works.¹¹⁷ In South African copyright law the Treaty has yet to be implemented. The Copyright Act 98 of 1978 has not yet been amended to implement the measures required to regulate digital copyright. However, South African law has adopted certain aspects of the Treaty. The provisions against circumvention were employed in South Africa's efforts to fight cyber crime. The anti-circumvention provisions were used in section 81 of the Electronic Communications and Transactions Act (ECTA) 25 of 2002, which makes it an offence to access, intercept or interfere with data without the relevant permission.¹¹⁸

The main problem with the implementation of these technological protection devices is that the Copyright Act 98 of 1987 was designed to protect works in tangible form. When the works are viewed online, every time someone accesses the work, this act constitutes copying the work. The trends currently employed in copyright law are also disturbing the balance between the rights of copyright holders and the rights of the public. Often, works protected by copyright are governed by licenses, which may frequently override the copyright exemptions.¹¹⁹ This has led to the gradual encroachment of copyright into the area of the public domain.¹²⁰ In some cases, once a work's copyright expires and it should rightly fall

¹¹⁵ Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 2.

¹¹⁶ World Intellectual Property Organisation *Copyright Treaty* (March 6, 2002) (http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (accessed 4 February 2010)).

¹¹⁷ Article 11 of the World Intellectual Property Organisation Copyright Treaty (March 6, 2002) (http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (accessed 4 February 2010)). See Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 2-3.

¹¹⁸ Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 7.

¹¹⁹ Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 9.

¹²⁰ The concept of the public domain is examined in detail under Chap 4 (The Value of Immaterial Property). The 'public domain' refers to the pool of intellectual property works that are not protected by intellectual property law, but are freely accessible to the public. This includes works of which the intellectual property law protection has expired as well as works that never qualified for such protection.

into the public domain, it is still inaccessible due to the technological protection measures put in place.¹²¹

The private law protection in terms of copyright as well as constitutional protection of digital copyright works need to be determined with reference to the separate interests of the private intellectual property holders and the public.¹²² It also becomes apparent that the law of copyright needs some form of revision in order to address the problems created by new technology. The inclusion of these immaterial property interests under the constitutional property concept may be one way in which the copyright holders' rights may be both protected and limited. This would enable the legislature and courts to maintain the balance between these rights and the public domain, since the constitutional property clause not only protects property interests, but provides for limitations in the form of expropriation and regulation.¹²³

3 6 Biotechnological Products

Nwabueze¹²⁴ states that Biotechnological advances pose challenges to property law, since property law concepts were formulated before modern biotechnological applications existed. Certain biotechnology companies have developed products that make use of body parts or other biological materials. These companies argue that they have property rights in these products and patents should be granted for the protection of rights in life forms.¹²⁵ The use of the concept of property in this context is controversial. In certain legal systems and cultures people might find the application of property law to the human body offensive. He states that there are religious, spiritual, economic and technological arguments that influence this debate about the application of the property label. He adds that traditional knowledge also poses

¹²¹ Pistorius T 'Developing countries and copyright in the information age – The functional equivalent implementation of the WCT' (2006) 2 *PER* 1-27 at 10.

¹²² The necessity of the public domain is discussed in Chap 4 (The Value of Immaterial Property).

¹²³ The implications of expropriation and regulation for immaterial property are discussed in Chap 5 (Immaterial Property Interests in the Constitution).

¹²⁴ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 1.

¹²⁵ Although the patent system provides protection to certain interests in biotechnological products, there are yet others that do not receive property protection in private law. It is the purpose of this section to determine whether these property interests could still enjoy constitutional property protection and if so, whether the legislator should change existing patent laws to provide protection for these interests; and not to create a new category of intellectual property. There are also many other non-property interests relating to rights to bodily integrity, privacy and healthcare that also need to be considered before these property interests in biotechnological products that are not protected as property in private law can be considered for property protection either in constitutional law or private law.

challenges to property law. He notes that ‘modernity as well as antiquity has challenged property’.¹²⁶ This may be an example of the moral non-excludability that Gray¹²⁷ mentions.

Grey¹²⁸ examines the historical background to the law of cadavers; from the first important case in English law, *R v Lynn*,¹²⁹ where the defendant was charged with taking away a dead body from the ground with the purpose of dissecting it; through to cases on the commerce in human organs.¹³⁰ The question arising in the context of the commerce in human organs is whether cadaver parts should be subject to sale, either after death by the relatives of the deceased or ‘in advance’ during the lifetime of the person. Two reasons forwarded for the state’s refusal to allow the sale of body parts are that it is unsavoury and that there are rational policy arguments against it.¹³¹ Similar arguments may be made against the granting of property rights in biotechnological products based on body parts (cells), since they may be viewed as morally non-excludable.

Regarding the nature of property, Nwabueze¹³² states that property is variable and that this allows much freedom to characterize some new forms of intangibles as property. Property protection may be conferred as it becomes necessary according to the specific conditions and time. This flexible nature of property makes it a valuable tool for analysing some of the legal, political and socio-economic challenges that a society may face. Nwabueze also shows that property is not static, but dynamic. That which may qualify as property at one stage may later no longer be termed property. The content of property rights are strongly influenced by the specific period of time. Property rights may also differ from one society to the next.¹³³ He gives the example of the era of slavery in order to illustrate this point. At that point in time, slaves could not own property. They themselves were objects of property. These days the ownership of human beings is unacceptable and the constitutions and laws of most countries

¹²⁶ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 1. Also see Pottage A ‘The inscription of life in law: Genes, patents and biopolitics’ (1998) 61 *MLR* 740-765.

¹²⁷ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307.

¹²⁸ Grey TC *The Legal Enforcement of Morality* (1983) 105-153.

¹²⁹ 100 Eng Rep 394 (1788).

¹³⁰ For further reading on the early history of the law of cadavers, see Grey TC *The Legal Enforcement of Morality* (1983) 105-118, *State v Bradbury* 9 A 2d 657 (1939) (Maine Supreme Court) and *Yome v Gorman* 242 NY 395 (New York Court of Appeals 1926).

¹³¹ Grey TC *The Legal Enforcement of Morality* (1983) 141.

¹³² Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 13.

¹³³ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 13.

reflect this position. Similarly, in previous times, land had been the most important form of property and the property system had been modelled to cater for the protection of rights in land.

These and other policy considerations may certainly be used in order to determine which property interests may enjoy constitutional protection. However, the concept of property in South African private law has not historically been as flexible.¹³⁴ It is proposed that the concept of property in private law may also be in need of some revision to bring it in line with the Constitution. Today information is fast becoming a more important form of wealth. Innovations of technological and social origin usually lead to new forms of property and also bring changes to the existing property model.¹³⁵ At this stage the private property model utilised in South Africa has not been adapted to accommodate these new forms of informational property. A broad-scale revision of intellectual property legislation could be necessary, either by creating new categories of intellectual property or by adapting existing forms. In the area of constitutional property law, the wider property concept has the result that there may be scope to include biotechnological products.

Vandeveldel¹³⁶ states that the meaning of the term ‘property’ has changed radically during the history of the United States. His essay focuses on two elements of Blackstone’s theory of property, namely the physicalist conception and the absolutist conception; and the incremental move away from these ideas. For the purposes of this chapter, focus falls on the movement away from the physicalist conception. In Blackstone’s era, the courts purported to be protecting the possession of things. Where there was no physical thing, one was fictionalised. In the nineteenth century, courts encountered situations where it was more important to protect intangible wealth than tangible things. Subsequently, property was termed to be the right to value instead of the right to a physical thing.¹³⁷ Gradually, courts recognised business goodwill as a separate property right, unconnected to the premises or

¹³⁴ Traditionally a closed number of categories of property were defined and adding new forms of property proved problematic. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 23-24 and Van der Merwe *Sakereg* (2nd ed 1989) 11. However, in constitutional property law this is not the case, since a much wider definition of the property concept is used here. In this context, Nwabueze’s comments also ring true for South African law.

¹³⁵ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 14-15.

¹³⁶ Vandeveldel KJ ‘The new property of the nineteenth century: The development of the modern concept of property’ (1980) 29 *Buffalo LR* 325-367 at 325.

¹³⁷ Vandeveldel KJ ‘The new property of the nineteenth century: The development of the modern concept of property’ (1980) 29 *Buffalo LR* 325-367 at 333.

tangible property of a business. Eventually trademarks;¹³⁸ trade secrets;¹³⁹ as well as oil and gas¹⁴⁰ were recognised as property in both the United Kingdom¹⁴¹ and the United States of America.¹⁴²

More recently, similar challenges have been posed to the property concept. Nwabueze¹⁴³ explores the challenges to property posed by DNA banks and commercial interests in genetic information. He states that it may be controversial to establish a DNA bank when this is being done by a commercial company in a developing country. In such a case there is the danger that commercial exploitation may take place. Furthermore, he argues that privacy may be an issue. He explores the idea of granting the persons whose DNA is being used a limited property right, simply in order to protect their privacy. Using this framework, it should also be possible for these persons to claim a part of the profit deriving from the DNA use and to control access to the DNA.¹⁴⁴ Nwabueze argues that there are advantages to protecting DNA

¹³⁸ Vandeveldel KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 341-348.

¹³⁹ Vandeveldel KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 348-354.

¹⁴⁰ Vandeveldel KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 354-357.

¹⁴¹ Regarding trademarks see *Singleton v Boulton* 3 Doug 293, 99 Eng Rep 661 (1783); *Millington v Fox* 3 My & Cr 338, 40 Eng Rep 956 (1838) citing Vandeveldel KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 341-342. Regarding trade secrets see *Newberry v Janes* 2 Mer 445, 35 Eng Rep 1011 (1817); *Smith v Dickenson* 3 Bos & Pul 630, 127 Eng Rep 339 (1804); *Williams v Williams* 3 Mer 157, 36 Eng Rep 61 (1817); *Yovatt v Winyard* 1 Jac & W 393, 37 Eng Rep 425 (1820); *Bryson v Whitehead* 1 Sim & St 74, 57 Eng Rep 29 (1822); *Green v Folgham* 1 Sim & St 398, 57 Eng Rep 159 (1823); *Cholmondeley v Clinton* 19 Ves 261, 34 Eng Rep 515 (1815); *Evitt v Price* 1 Jac & W 394, 57 Eng Rep 659 (1827); *Morison v Moat* 9 Hare 241, 68 Eng Rep 492 (1851) citing Vandeveldel KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 348-353.

¹⁴² Regarding trademarks see *Thompson v Winchester* 36 Mass (19 Pick) 214 (1837); *Bell v Locks* 8 Paige Ch 75 (NY 1840); *Taylor v Carpenter* 11 Paige Ch 292 (NY 1844); *Coats v Nelson Holbrook & Co* 2 Sand Ch 586 (NY 1845); *Trade-Mark Cases* 100 US 82 (1879); *Kidd v Johnson* 100 US 617 (1879); *American Waltham Watch Co v US Watch Co* 173 Mass 85, 53 NE 141 (1899); *Sartor v Schader* 125 Iowa 696, 101 NW 511 (1904); *Cohen v Nagle* 190 Mass 4, 76 NE 276 (1906); *Star Milling Co v Metcalf* 240 US 403 (1916); *Pease v Scott County Milling Co* 5 F2d 524 (ED Mo 1925) and *France Milling Co Inc v Washburn-Crosby Co Inc* 7 F2d 340 (2d Cir 1925) citing Vandeveldel KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 342-348. Regarding trade secrets see *Vickery v Welch* 36 Mass (19 Pick) 523 (1837); *Peabody v Norfolk* 98 Mass 452 (1868); *El DuPont DeNemours Powder Co v Masland* 244 US 100 (1917) citing Vandeveldel KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 351-354.

¹⁴³ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 147-149.

¹⁴⁴ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 147-149.

samples by means of the property regime. This would strengthen the protection already afforded by other means.¹⁴⁵

In the United States case of *Moore v The Regents of the University of California*¹⁴⁶ a cell line was patented, but the facts leading to the case created controversy. Moore underwent treatment for leukaemia at the University of California Medical Centre. The doctors realised that components of his blood had the potential to be used in commercial products. They did not inform him of their commercial interest and did many tests on his genetic material. Eventually, Moore's spleen was removed for (arguably)¹⁴⁷ medical reasons and sections thereof were used for further research. The University of California patented a cell line derived from Moore's T-lymphocytes.

Boyle¹⁴⁸ argues that the two problematic aspects of this case are both concerned with information. On the one hand Moore was not informed of the commercial interest in his genetic material. The doctors after all had a duty to inform him of such interests. The case is furthermore also concerned with the ownership and control of genetic information. The genetic information contained within T-lymphocytes (white blood cells) is coded with 'programs' for the production of lymphokines, which are proteins that regulate the immune system. By isolating these 'programs', the lymphokine may be reproduced by recombinant DNA processes.¹⁴⁹ The question before the court in the *Moore*¹⁵⁰ case had been whether Moore owned the genetic information in his cells, or even the cells from which the information had been derived. The court held that he did not have ownership of either. The court gave a variety of reasons for this decision.

First, Moore had abandoned the cells when he gave his consent to have it removed. This is not compatible with the fact that Moore had not been given sufficient information to give informed consent to the removal.¹⁵¹ The second reason furnished by the court was that cells

¹⁴⁵ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 170. Also see Pottage A 'The inscription of life in law: Genes, patents and biopolitics' (1998) 61 *MLR* 740-765.

¹⁴⁶ 51 Cal 3d 12; 271 Cal Rptr 146; 793 P 2d 479 1991.

¹⁴⁷ See Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 22 on this point.

¹⁴⁸ Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 22.

¹⁴⁹ Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 22.

¹⁵⁰ *Moore v The Regents of the University of California* 51 Cal 3d 12, 271 Cal Rptr 146, 793 P 2d 479 1991.

¹⁵¹ Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 23.

are not property since they are highly regulated. Boyle¹⁵² states that all forms of property are subject to regulation and that the court's statement is accordingly meaningless. The court finally also stated that it might hinder research if a property right in Moore's genetic material were to be given to him. The court argued that there is a relatively free and efficient exchange of scientific materials which would be hampered by property rights in each and every cell. Boyle¹⁵³ points out the contradiction in the court's argument, since the court awarded a property right in the cell line to the doctors who isolated the cell line. The court stated that this is a necessary incentive to promote research.¹⁵⁴ It becomes apparent that different considerations are at play when deciding on whether a property right is appropriate.

Another consideration, according to Nwabueze,¹⁵⁵ is the characteristics of genes. These need to be examined in order to apply the property framework. It is necessary to distinguish between the human tissue samples and the genetic information derived from such samples. The tissue samples are tangible and physical and Nwabueze argues that as such, it may be easier to classify such samples as property. The genetic information, on the other hand, is intangible and may hence more easily be seen as mere data. There are two separate arguments why this genetic information should be protected as property, even though it is intangible. The first is that the genes may be analogised to tangible property and as such should be protected. The second argument is that even if these genes are not physical, they are still valuable pieces of information and should consequently be protected nevertheless.

According to the first argument, it would be anomalous to protect the external manifestation of the body, but not its fundamental blocks. If genes can be characterized as body parts, it would enjoy property protection and legal mechanisms such as the law of delict, privacy and the law pertaining to the protection of dead bodies would become applicable. Persons would have to give their consent before their genes or DNA may be used for research. There are, however, certain objections to propertising genes. For example, the Australian Law Reform Commission voiced concerns about the inalienability of genes. However, Nwabueze proposes that the solution to this problem is to merely confer a limited property right by excluding

¹⁵² Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 23.

¹⁵³ Boyle J *Shamans, Software, & Spleens – Law and the Construction of the Information Society* (1996) 24.

¹⁵⁴ The aspect of property rights as an incentive is discussed in detail in Chap 4 (The Value of Immaterial Property).

¹⁵⁵ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 171-175.

some of the incidents of property, for example the right to sell the property.¹⁵⁶ If one follows the court in the *Moore*¹⁵⁷ case and the statement that cells are not property because they are highly regulated, this approach would not solve the problem.

The second argument entails recognising genes as informational property. Nwabueze acknowledges that the issue whether there may be property in information is an extremely controversial one. It is even more so in the case of genetics. He proposes that genetic data should be protected as what he terms ‘family property’. Since genetic data runs in a family, it would be sensible to award private property rights to a family, thereby taking it out of the commons. This is so because issues of privacy and confidentiality may affect not only the individual from who the sample was taken, but the whole family. The final part of this argument entails the legal recognition of information as property. The most important question in this context is whether genetic information may be protected separately from the physical samples. This would entail protecting genetic information as confidential information.

The example of companies may also be used in this context. Many companies own commercially valuable information together with physical assets. Since the courts routinely grant protection to physical assets, it would be illogical not to protect valuable information. Similarly, biotechnological companies are also dependent on confidential information consisting of genetic information. Such information usually enjoys the protection of patent law. It has not been established whether genetic information could be protected outside of the intellectual property regime. Courts, however, have not been consistent in treating information as property.¹⁵⁸ Whether or not information or other forms of intangible interests may be characterised as property seems to depend on the justifications put forward for conferring property rights on a certain interest. According to Nwabueze,¹⁵⁹ property rights should be granted for cells and for information derived from cells, an example being patents for cell lines. According to Nwabueze, the only question left to answer is whether such

¹⁵⁶ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 171-175.

¹⁵⁷ *Moore v The Regents of the University of California* 51 Cal 3d 12; 271 Cal Rptr 146; 793 P 2d 479 1991.

¹⁵⁸ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 175-188.

¹⁵⁹ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 175-188.

property rights should be awarded to the person from whom the cells were taken or to the person who developed the cell line.

The problems created by biotechnological products are no less real in South Africa. Therapeutic embryonic stem cell research¹⁶⁰ is one of the controversial areas of biotechnology that is being utilised progressively more in South Africa. This line of research raises various legal and ethical issues. The research is promising and knowledge could be used in curing or reversing disease processes that are currently irreversible.¹⁶¹ The most important issue for purposes of this chapter is the question of intellectual and other property rights in human cell lines and the techniques used to produce it. According to Dhai et al¹⁶² there is no global consensus on the position of therapeutic embryonic stem cell research in legal systems. Aside from the ethical concerns regarding cloning, there is concern that the patenting of the techniques used to produce human cell lines may obstruct access to healthcare. Furthermore there are questions as to the suitability of the human body as the subject of property rights and also whether the human genome is actually the common heritage of mankind, in other words, it must stay in the commons. Dhai *et al*¹⁶³ suggest that legislation may be created to prevent such patents.

Cloning for stem cell research is allowed under restricted circumstances in most countries.¹⁶⁴ In South Africa cloning has been prohibited by section 39A of the Human Tissue Act 65 of

¹⁶⁰ According to Dhai A, Moodley J, McQuoid-Mason DJ & Rodeck C 'Ethical and legal controversies in cloning for biomedical research – A South African perspective' (2004) 94 *SAMJ* 906-909 at 906, '[s]tem cells are tissue precursor cells that have the ability to self-renew and differentiate into more specific adult cells required in the body'. Embryos are cloned in order to take stem cells for research and this causes the controversy. Also see Moore TJ 'Stem cell Q and A – An introduction to stem cells and their role in scientific and medical research' (2007) 21 *Medical Technology SA* 3-6 at 3-4. See further Thomas SM 'Genomics and intellectual property rights' (1999) 4 *DDT* 134-138 at 134-136 for a specific explanation of genomics and the patenting of genes.

¹⁶¹ Dhai A, Moodley J, McQuoid-Mason DJ & Rodeck C 'Ethical and legal controversies in cloning for biomedical research – A South African perspective' (2004) 94 *SAMJ* 906-909 at 906.

¹⁶² Dhai A, Moodley J, McQuoid-Mason DJ & Rodeck C 'Ethical and legal controversies in cloning for biomedical research – A South African perspective' (2004) 94 *SAMJ* 906-909 at 906.

¹⁶³ Dhai A, Moodley J, McQuoid-Mason DJ & Rodeck C 'Ethical and legal controversies in cloning for biomedical research – A South African perspective' (2004) 94 *SAMJ* 906-909 at 908.

¹⁶⁴ Dhai A, Moodley J, McQuoid-Mason DJ & Rodeck C 'Ethical and legal controversies in cloning for biomedical research – A South African perspective' (2004) 94 *SAMJ* 906-909. In Germany, Austria, Ireland, Denmark and France research on embryos requiring its destruction is prohibited. In Britain, research on embryos is only permitted until the 14th day of development. In the United States of America federal funding for human embryo research is banned. In Australia the legislation varies between the states.

1983¹⁶⁵ since 1984. This Act has subsequently been replaced by the National Health Act 61 of 2003 and section 57 now prohibits cloning, but allows for certain exceptions.¹⁶⁶ These exceptions that need to be permitted by the Minister of Health are therapeutic cloning utilising adult or umbilical cord stem cells and research on zygotes that are not older than 14 days. This is similar to the position in Britain. The National Health Act 61 of 2003 also contains certain provisions regulating any payments received for tissue, blood, blood products or gametes.¹⁶⁷ Payments may only be made to certain entities and is restricted to ‘an

¹⁶⁵ Sec 39A of the Human Tissue Act 65 of 1983 reads as follows: ‘Notwithstanding anything to the contrary contained in this Act or any other law, no provision of this Act shall be so construed as to permit genetic manipulation outside the human body of gametes or zygotes.’

¹⁶⁶ Sec 57 of the National Health Act 61 of 2003 pertaining to the prohibition of reproductive cloning of human beings states that:

- ‘(1) A person may not-
 - (a) manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or
 - (b) engage in any activity, including nuclear transfer or embryo splitting, for the purpose of the reproductive cloning of a human being.
- (2) The Minister may, under such conditions as may be prescribed, permit therapeutic cloning utilising adult or umbilical cord stem cells.
- (3) ...
- (4) The Minister may permit research on stem cells and zygotes which are not more than 14 days old on a written application and if-
 - (a) the applicant undertakes to document the research for record purposes; and
 - (b) prior consent is obtained from the donor of such stem cells or zygotes.
- (5) ...
- (6) For the purpose of this section-
 - (a) “reproductive cloning of a human being” means the manipulation of genetic material in order to achieve the reproduction of a human being and includes nuclear transfer or embryo splitting for such purpose; and
 - (b) “therapeutic cloning” means the manipulation of genetic material from either adult, zygotic or embryonic cells in order to alter, for therapeutic purposes, the function of cells or tissues.’

¹⁶⁷ Section 60 of the National Health Act 61 of 2003 regulates the aspect of payment in connection with the importation, acquisition or supply of tissue, blood, blood products or gametes:

- ‘(1) No person, except-
 - (a) a hospital or an institution contemplated in section 58 (1) (a), a person or an institution contemplated in section 63 and an authorised institution or, in the case of tissue or gametes imported or exported in the manner provided for in the regulations, the importer or exporter concerned, may receive payment in respect of the acquisition, supply, importation or export of any tissue or gamete for or to another person for any of the purposes contemplated in section 56 or 64;
 - (b) a person or an institution contemplated in section 63 or an authorised institution, may receive any payment in respect of the importation, export or acquisition for the supply to another person of blood or a blood product.
- (2) The amount of payment contemplated in subsection (1) may not exceed an amount which is reasonably required to cover the costs involved in the importation, export, acquisition or supply of the tissue, gamete, blood or blood product in question.
- (3) This section does not prevent a health care provider registered with a statutory health professional council from receiving remuneration for any professional service rendered by him or her.
- (4) It is an offence for a person-
 - (a) who has donated tissue, a gamete, blood or a blood product to receive any form of financial or other reward for such donation, except for the reimbursement of reasonable costs incurred by him or her to provide such donation; and
 - (b) to sell or trade in tissue, gametes, blood or blood products, except as provided for in this chapter.

amount which is reasonably required to cover the costs involved in the importation, export, acquisition or supply of the tissue, gamete, blood or blood product in question'.¹⁶⁸ The person who supplies the tissue, gamete, blood or blood product is also prohibited from receiving payment for such product and any such payment would constitute an offence.¹⁶⁹

The question of biotechnological products derived from human cells is complex. The current position is that most forms of human cloning is prohibited in South Africa, so any interests in such products or the information embodied therein would not be protected as property under private law and also not under constitutional property law, save for the few exceptions. Only the biotechnological products that would qualify for a patent would be protected in private law and subsequently also in constitutional law. The Patent Act specifically excludes any form of cloning to be the subject of a patent.¹⁷⁰

If all biotechnological products were to be included under the constitutional property clause, there would be many other fundamental rights rivalling such a right. For example the right to human dignity,¹⁷¹ the right to privacy¹⁷² and possibly other rights would be affected by the development of such products. These issues could even arise in cases where the biotechnological product does fall into one of the exceptions and is hence protected, for example cloning for therapeutic purposes. Only the biotechnological products that would qualify for a patent would be protected in private law and consequently also in constitutional law. Perhaps it would be useful for legislation pertaining to patents to be updated to make specific provision for these biotechnological products or in the alternative for entirely new and separate legislation to be created specifically for these products. Furthermore it is also not permitted to sell any products such as tissue, gametes, blood or blood products;¹⁷³ therefore these products would not be protected as property either in private law or constitutional law. In summary, there are certain biotechnological products that could be recognised and protected under constitutional property law, but only those that are not prohibited by way of legislation or viewed as morally non-excludable.

(5) Any person convicted of an offence in terms of subsection (4) is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.'

¹⁶⁸ National Health Act 61 of 2003 sec 60(2).

¹⁶⁹ National Health Act 61 of 2003 sec 60(4)-(5).

¹⁷⁰ Patents Act 57 of 1978 sec 25(4) (b). See Chap 2 (Traditional Immaterial Property Interests) for a more detailed discussion of the requirements for a patent and exclusions from patentability.

¹⁷¹ Constitution of the Republic of South Africa 1996 sec 10.

¹⁷² Constitution of the Republic of South Africa 1996 sec 14.

¹⁷³ Section 60 of the National Health Act 61 of 2003.

3 7 Traditional Knowledge

In this section, three important questions emerge. Firstly, the question of what may be regarded as traditional knowledge. Second, what role intellectual property should play in the traditional knowledge debate and lastly, how this pertains to South Africa.

Nwabueze¹⁷⁴ explains that traditional knowledge forms part of the cultural heritage of a people. He states that this knowledge is important because traditional medicine is the main source of health care in traditional communities and many developing countries. Some products of traditional knowledge, such as traditional art, traditional music and traditional medicine, also have commercial value. Nwabueze gives the example of indigenous images which have been appropriated to be used in the marketing of different kinds of goods. These include T-shirts, automobiles and souvenirs. Pharmaceutical companies have also used traditional medicine knowledge to discover plants with medicinal properties and to patent drugs. There are furthermore some uses of the traditional knowledge by outsiders that debase the spirituality and culture of the holders of that traditional knowledge.¹⁷⁵

Visser¹⁷⁶ gives a wide definition of traditional knowledge that includes

‘traditional and tradition-based literary, artistic and scientific works; performances; inventions; scientific discoveries; designs, marks, names, and symbols; undisclosed information; and all other innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. So categories of traditional knowledge include agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medical knowledge, including knowledge relating to medicines and remedies; knowledge relating to biodiversity; traditional cultural expressions in the form of music, dance, song, handicrafts, designs, stories, artworks and elements of language (such as names, geographical indications, and symbols), and movable cultural properties’.¹⁷⁷

From this definition it becomes clear that traditional knowledge may be relevant to practically all categories of intellectual property and other immaterial property categories. There are instances where patents, copyright, registered designs, trademarks and even confidential information may be used respectively, either to protect or exploit traditional

¹⁷⁴ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 2.

¹⁷⁵ Nwabueze RN *Biotechnology and the Challenge of Property – Property Rights in Dead Bodies, Body Parts, and Genetic Information* (2007) 2.

¹⁷⁶ Visser C ‘Some thoughts on making intellectual property work for traditional knowledge’ (2002) 14 *SA Merc LJ* 656-687.

¹⁷⁷ Visser C ‘Some thoughts on making intellectual property work for traditional knowledge’ (2002) 14 *SA Merc LJ* 656-687 at 656.

knowledge. In his essay on the control of Native American intellectual property rights, Nason¹⁷⁸ states that intellectual property is by its very nature a kind of cultural property.

Nason¹⁷⁹ explains that the esoteric knowledge that has received attention by outside scholars and the associated concerns of Native Americans with sharing that knowledge is of particular importance. He uses the concept of esoteric knowledge to refer to traditional, valued knowledge that is designated for the use of the specially initiated or trained. He states that this knowledge is mostly owned or held in trust and treated as private or secret by an individual, by a group within the community (such as a clan or society) or by the community as a whole. In some cases this knowledge may be sacred and yet in others it may be patrimonial in nature. This traditional knowledge is typically regarded as property within tribal legal systems and 'therefore constitutes a key form of traditionally defined intellectual property'.¹⁸⁰ It appears from this that the concern over the control of esoteric knowledge stems from two distinct situations. The first is where knowledge is sacred or secret and traditional people fear that it may be misused, thereby tarnishing their culture.¹⁸¹ The second scenario is where esoteric knowledge may be used for commercial gain, such as relying on the traditional knowledge to register patents derived from plants. Nason argues that the focus of current efforts by Native Americans and other indigenous peoples in the world to control their esoteric knowledge and other forms of important intellectual property has been on the management of research; creative and associated cultural heritage; and knowledge connected to animals and plants.¹⁸²

¹⁷⁸ Nason JD 'Native American intellectual property rights: Issues in the control of esoteric knowledge' in Ziff B & Rao PV (eds) *Borrowed Power - Essays on Cultural Appropriation* (1997) 237-254 at 237.

¹⁷⁹ Nason JD 'Native American intellectual property rights: Issues in the control of esoteric knowledge' in Ziff B & Rao PV (eds) *Borrowed Power - Essays on Cultural Appropriation* (1997) 237-254.

¹⁸⁰ Nason JD 'Native American intellectual property rights: Issues in the control of esoteric knowledge' in Ziff B & Rao PV (eds) *Borrowed Power - Essays on Cultural Appropriation* (1997) 237-254 at 242-243.

¹⁸¹ See Coombe RJ 'Tenth Anniversary Symposium: New direction: Critical cultural legal studies' (1998-1999) 10 *Yale JL & Human* 463-486 at 468 where she describes some everyday intellectual property objects that she notes as she walks down a street. She notes a particularly apt example which illustrates the problems posed by the misuse of traditional culture: 'A cheerful Disney film titled *The Indian in the Closet* is advertised through marketing tie-ins promoted by McDonalds(R) - children are promised their own free "Indian" with every Happy Meal™. Both in the Magic Kingdom(R) and under The Golden Arches(R), native peoples are mere toys to fire fantasy. Attempts by First Nations peoples to "come out of the closet" and protest their stereotyping in commercial culture provide poignant reminders of the political stakes in contemporary struggles over commodified representations.'

¹⁸² Nason JD 'Native American intellectual property rights: Issues in the control of esoteric knowledge' in Ziff B & Rao PV (eds) *Borrowed Power - Essays on Cultural Appropriation* (1997) 237-254 at 246.

Visser¹⁸³ explains the problem of biopiracy (the appropriation of scientific and technical traditional knowledge) as follows: ‘In the context of biodiversity and genetic resources, nature smiles on developing countries.’¹⁸⁴ He states that estimates have been made that developing countries hold about 90 percent of the world’s genetic resources. However, developed countries account for more than 90 percent of the world’s research and development activity. He states that ideally, both of the interest groups should benefit from these facts. This, however, has not been the case. Visser explains that customarily, genetic resources were held to be part of the ‘common heritage of mankind’. This approach empowered users in developed countries to freely exploit genetic resources. The countries or communities that held and provided the resources generally received no return of economic benefit. The communities that lived near the genetic resources and biological resources usually did not participate in the advanced research that resulted in the inventions that were protected by intellectual property. Also there was no legal obligation on companies to share profits. As a result countries hosting biological resources generally did not benefit economically from the biological diversity.¹⁸⁵

Shiva defines the problem of biopiracy as follows:

‘Biopiracy refers to the use of intellectual property systems in order to legitimize exclusive ownership and control over biological resources and biological products and processes that have been used over centuries in non-industrialized cultures. Patent claims over biodiversity and indigenous knowledge that are based on the innovation, creativity and genius of the people of the Third World are acts of “biopiracy”.’¹⁸⁶

A patent is given for an invention and accordingly a patent that was based on an act of biopiracy does not acknowledge the innovation which forms part of the traditional knowledge. Biopiracy occurs because western patent systems do not sufficiently protect traditional knowledge. Shiva¹⁸⁷ argues that similar to *terra nullius*, there is an equivalent in the knowledge context, which she calls ‘Bio-Nullius’. In this she means the way that biodiversity knowledge is treated as not being owned or created by the person or group who

¹⁸³ Visser C ‘Biodiversity, bioprospecting, and biopiracy: A prior informed consent requirement for patents’ (2006) 18 *SA Merc LJ* 429-439 at 429.

¹⁸⁴ Visser C ‘Biodiversity, bioprospecting, and biopiracy: A prior informed consent requirement for patents’ (2006) 18 *SA Merc LJ* 429-439 at 429.

¹⁸⁵ Visser C ‘Biodiversity, bioprospecting, and biopiracy: A prior informed consent requirement for patents’ (2006) 18 *SA Merc LJ* 429-439 at 429.

¹⁸⁶ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 49.

¹⁸⁷ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 49.

held it previously. Consequently it may be claimed through ‘invention’.¹⁸⁸ This links to the traditional concept that traditional knowledge falls within the public domain and as such is open to appropriation.

Roht-Arriaza¹⁸⁹ more specifically discusses the appropriation of scientific and technical traditional knowledge. She states that traditional knowledge has been freely appropriated because it has not been acknowledged as being either scientific or valuable to the culture holding the knowledge:

‘The appropriation of the scientific and technical knowledge of traditional and resource-based peoples, of the products of that knowledge, and even the genetic characteristics of the people themselves has become both notorious and contested.’¹⁹⁰

Roht-Arriaza cites a range of examples where Western corporations appropriated traditional knowledge in order to patent medicines originating from plants. She names Quinine, which is used in the treatment of malaria. This substance is made from the bark of the Peruvian cinchona tree. The bark has been used as a cure for fevers by Andean indigenous groups, who supposedly learned of the bark’s abilities while observing feverish jaguars eating it. Unique to Madagascar is the rosy periwinkle, a plant that has been found to contain properties important in the treatment of leukaemia as well as other cancers. Bristol-Meyers Squibb developed the drugs vincristine and vinblastine from the periwinkle. The company receives \$100 million in sales annually and Madagascar receives virtually nothing.¹⁹¹ These are only two examples of corporations that committed biopiracy, in other words scientific and technical traditional knowledge was appropriated without giving acknowledgement or financial reward.

Shiva points out that ninety-four percent of top-selling drugs that were derived from plants contain at least one ingredient that has seen prior therapeutic use in traditional medicine. Also with pesticides, companies have begun to realise that chemical pesticides do more harm and also increase pests. Therefore they are turning to biological pesticides. *Neem* and *pongamia*

¹⁸⁸ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 49.

¹⁸⁹ Roht-Arriaza N ‘Of seeds and Shamans: The appropriation of the scientific and technical knowledge of indigenous and local communities’ in Ziff B & Rao PV (eds) *Borrowed Power - Essays on Cultural Appropriation* (1997) 255-287.

¹⁹⁰ Roht-Arriaza N ‘Of seeds and Shamans: The appropriation of the scientific and technical knowledge of indigenous and local communities’ in Ziff B & Rao PV (eds) *Borrowed Power - Essays on Cultural Appropriation* (1997) 255-287 at 255.

¹⁹¹ Roht-Arriaza N ‘Of seeds and Shamans: The appropriation of the scientific and technical knowledge of indigenous and local communities’ in Ziff B & Rao PV (eds) *Borrowed Power - Essays on Cultural Appropriation* (1997) 255-287 at 256.

are such plant-based pesticides which were derived making use of traditional knowledge.¹⁹² *Neem* was mentioned in Indian texts that were written more than 2000 years ago. It was used as an air purifier and as a cure for many human and animal ailments, because it has insect- and pest repellent qualities. *Neem*-based insect repellents have been proven to be very efficient, even where insects were resistant to other pesticides. Since *neem* has been used on a commercial scale, this has had three primary negative effects for the Indian community. Firstly, the price of *neem* seed has risen to the extent that it is no longer available to local people. Secondly, seed that was previously available to farmers are now being bought by the company as a result of its economic power. Finally, underprivileged people no longer have access to the resource that was important to their survival and they do not have ready access to modern medical treatments. At no stage was the traditional medicinal knowledge of the Indian community acknowledged.¹⁹³

A South African example of controversy around traditional knowledge would be the Hoodia plant which has long been used by the San communities as an appetite suppressant during times of hunger.¹⁹⁴ Various pharmaceutical companies have done research on the plant and have acquired patents over certain isolates that have medicinal value. The South African Council for Scientific and Industrial Research (CSIR) filed a patent relating to the appetite-suppressing qualities of the plant in 1997. Reportedly, they concluded a benefit-sharing agreement with the San people, who have subsequently already received benefits. However, the matter is further complicated by the South African National Environmental Management: Biodiversity Act 10 of 2004 (the Biodiversity Act).¹⁹⁵ According to the definitions of the Biodiversity Act (section 1),

“biological diversity” or “biodiversity” means the variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species, and of ecosystems; “bioprospecting”, in relation to indigenous biological resources, means

¹⁹² Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 50-53.

¹⁹³ Shiva V *Protect or Plunder? Understanding Intellectual Property Rights* (2001) 57-61.

¹⁹⁴ Joffe F ‘The hoo-ha about Hoodia’ (2007) *Dec Without Prejudice* 6-7. See Vermaak I & Viljoen A ‘Indigenous South African medicinal plants: Part 9: Hoodia gordonii: Medicinal plants’ (2008) 75 *SAPJ* 37 for a specific botanical description of the plant, its traditional uses and scientific research on the plant and its properties.

¹⁹⁵ Joffe F ‘The hoo-ha about Hoodia’ (2007) *Dec Without Prejudice* 6-7.

any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation'.¹⁹⁶

For any bioprospecting done in South Africa, a permit has to be obtained from the state and such a permit would only be granted once the company wishing to perform such bioprospecting has reached a benefit-sharing agreement with the holders of the traditional knowledge. Such an agreement must be based on full disclosure of information about the intended use of the biological resource to which the traditional knowledge pertains. Amendments to the Patents Act 57 of 1978 have been drafted to incorporate the requirements of the Biodiversity Act, in the Patents Amendment Act 20 of 2005 which came into force in 2007. These amendments require a patent application to include information about any traditional knowledge; or indigenous biological or genetic resource that was used to derive a patent or base it on.¹⁹⁷

As Joffe¹⁹⁸ notes, there are many problems with the implementation of the Biodiversity Act relating to traditional knowledge. It is difficult to establish to whom remuneration should be paid, since there is not only one holder of the traditional knowledge. Furthermore, patents based on traditional knowledge do not use the traditional knowledge as is, but large amounts of scientific research is necessary before a specific patent may be derived. Another problem is the fact that South Africa does not have the means to exploit biological resources and traditional knowledge for the use of patents. Joffe¹⁹⁹ argues that more attention should be spent on developing South Africa's ability to create patents and less on the traditional knowledge debate. However, this approach does not create an immediate solution to the problem of how to provide protection for traditional knowledge.

¹⁹⁶ This includes:

'(a) the systematic search, collection or gathering of such resources or making extractions from such resources for purposes of such research, development or application;
(b) the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities; or
(c) research on, or the application, development or modification of, any such traditional uses, for commercial or industrial exploitation'.

¹⁹⁷ Section 30(3A) and 30(3B) of the Patents Act incorporate these provisions.

¹⁹⁸ Joffe F 'The hoo-ha about Hoodia' (2007) Dec *Without Prejudice* 6-7 at 7.

¹⁹⁹ Joffe F 'The hoo-ha about Hoodia' (2007) Dec *Without Prejudice* 6-7 at 7.

The next question that this section attempts to address is the role of intellectual property mechanisms in the protection of traditional knowledge. Ghosh²⁰⁰ states that the debate over traditional knowledge has largely focused on the compatibility of protecting ancient and established knowledge by means of intellectual property, which is in reality a tool of progress. Defenders of this use of intellectual property to protect traditional knowledge use the law in order to encourage the progress and dissemination of traditional knowledge systems that would otherwise be appropriated by powerful corporations. Critics of this use of intellectual property argue that the expansion of intellectual property to accommodate the protection of traditional knowledge would lead to other expansions of intellectual property law, for example extending the terms for copyright and patents or expanding the derivative work right.²⁰¹ As put forward by Ghosh,²⁰² these arguments for and against the use of intellectual property to protect traditional knowledge both contain conceptions of distributive justice. He reasons that traditional knowledge will be used, whether it is protected as intellectual property or not; the only remaining question is by whom and how it will be used.²⁰³

According to Ghosh,²⁰⁴ there are three basic positions in the traditional knowledge debate. He refers to these as the public domain position; the appropriation position; and the moral rights position. Supporters of the public domain position are in favour of keeping traditional knowledge in the public domain, so that it may be used by all entities in a global commons. The second group, namely those following the appropriation position, argue that entities making commercial or practical use of the traditional knowledge should receive exclusive ownership rights thereupon. When this position is followed, multinational companies situated in the developed world would most often own traditional knowledge. The last group, those persons who follow the moral rights position, would protect the interests of the holders of traditional knowledge. This would be done either by giving traditional knowledge holders full ownership to the exclusion of entities seeking to appropriate or exploit the knowledge or by

²⁰⁰ Ghosh S 'The fable of the commons: Exclusivity and the construction of intellectual property markets' (2007) 40 *UC Davis LR* 855-890.

²⁰¹ Ghosh S 'The fable of the commons: Exclusivity and the construction of intellectual property markets' (2007) 40 *UC Davis LR* 855-890 at 888. It is necessary to keep the debate about the protection of traditional knowledge separate from the debate about the extensions of intellectual property.

²⁰² Ghosh S 'The fable of the commons: Exclusivity and the construction of intellectual property markets' (2007) 40 *UC Davis LR* 855-890 at 889.

²⁰³ Ghosh S 'The fable of the commons: Exclusivity and the construction of intellectual property markets' (2007) 40 *UC Davis LR* 855-890 at 889.

²⁰⁴ Ghosh S 'Reflections on the traditional knowledge debate' (2003) 11 *Cardozo J Int'l & Comp L* 497-510.

giving the traditional knowledge holders a share in any business exploitation made by multinational corporations.²⁰⁵ Ghosh breaks down these positions into two questions that determine into which category an opinion falls. The first question is ‘should knowledge be commodified?’ and the second is ‘who should decide the uses of traditional knowledge?’

As argued by Ghosh,²⁰⁶ persons advocating the public domain position think that traditional knowledge should not be commodified, since they are wary of legal ownership created to control and regulate its use. They support traditional social structures that govern the preservation and control of traditional knowledge, even though this hampers the distribution of socially valuable uses of such knowledge. Followers of the appropriation position, on the other hand, support the commodification of traditional knowledge, particularly by entities that can make the greatest use of the knowledge by spreading it to as wide a market as achievable. Supporters of the moral rights position follow the same approach to commodification as the public domain position, except that members of the traditional structure could decide to market the knowledge. Ghosh proposes that this debate about traditional knowledge needs to be rethought ‘in terms of the federated, participatory structure by World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights²⁰⁷ (TRIPS)’.²⁰⁸ He explains that members of the TRIPS agreement²⁰⁹ should be seen as self-regulating sovereigns who function within the boundaries of the TRIPS agreement. The TRIPS agreement may be seen as a constitution for the member states, in terms of which member states must respect specified intellectual property rights of its citizens. Under the principle of national treatment, these rights would be extended to the citizens of other member states. Member states are allowed to place limitations on these rights. These limitations must, however, comply with the ‘substantive and procedural standards of Article 31 (which applies to compulsory licenses) and the substantive standards of Article 30 (which applies to all other limitations of rights)’.²¹⁰

²⁰⁵ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp L* 497-510 at 499-500.

²⁰⁶ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp L* 497-510 at 500.

²⁰⁷ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994 (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁰⁸ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp L* 497-510 at 501.

²⁰⁹ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994 (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²¹⁰ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp L* 497-510 at 501.

Ghosh²¹¹ further describes this governance structure as federated and participatory, since member states have room to shape the structure of rights and powers within the general outline of TRIPS.²¹² Intellectual property rights may consequently be defined in a myriad of different ways within the general provisions of the agreement. The TRIPS agreement is therefore not a restrictive document that prescribes standardisation. The agreement provides a ‘playing field’ within which the law may be fashioned to meet policy goals such as political, economic, social and other goals. He infers that it is not necessary that an identical, standardised set of cultural icons and economic norms be created. The other option is diversity, which has a place for an expansive public domain and uses of cultural property which are not for business. The option followed will depend on the way member states use the freedoms granted by TRIPS to work within its parameters.²¹³ This agreement recognises and provides the mechanism in terms of which the interests in both developing and developed countries may be protected.

Ghosh²¹⁴ refers to what he termed ‘strategic intellectual property rights’ to indicate that intellectual property, unlike natural resources, may be created by the state, in order to subsidise its constituencies and engage more efficiently in the international marketplace. He argues that the traditional knowledge debate is an illustration of ‘strategic intellectual property rights’. He uses the example of a pharmaceutical product based on traditional knowledge. Where the knowledge was used without permission or compensation, a part of the profit deriving from the patent (the return) should go to the source of the traditional knowledge. If traditional knowledge is protected as intellectual property, then the intellectual property is a strategic tool to extract the return of the patent. Finally Ghosh proposes that a combination of ‘strategic intellectual property rights’ and the freedom accorded by the TRIPS agreement²¹⁵ may be used in order to ensure that different members of the global market receive returns from that market.²¹⁶

²¹¹ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp L* 497-510.

²¹² World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994 (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²¹³ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp L* 497-510 at 501-512.

²¹⁴ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp Law* 497-510.

²¹⁵ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994 (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²¹⁶ Ghosh S ‘Reflections on the traditional knowledge debate’ (2003) 11 *Cardozo J Int’l & Comp Law* 497-510 at 504-505.

The last question relevant to this section pertains to traditional knowledge and intellectual property in South Africa. Visser²¹⁷ discusses a number of solutions to the problem of the appropriation of traditional knowledge. Certain intellectual property mechanisms from patents, trademarks, designs, copyright and the public domain may be employed as is or in a slightly varied form in order to protect traditional knowledge. The first form of protection relates to patents. Where traditional knowledge was exploited in order to locate a plant with properties leading to a patent, the traditional community is faced with a multitude of problems. Visser²¹⁸ explains that firstly, developing countries derive no financial benefit if the knowledge is simply appropriated by multinational companies. Secondly, the holders of the traditional knowledge are barred from registering a patent derived from their knowledge, since a patent was registered already. The holders of the knowledge may well find themselves unable to use that knowledge, since a patent confers a monopoly on its holder. Even though such a patent may be open to revocation, legal process is often too expensive to be an option to the traditional community. In some legal systems it is also required that a claim for revocation be backed by written evidence of prior art.

These problems may be solved by three complementary approaches, as suggested by Visser.²¹⁹ In the first instance, a requirement that applicants for a patent must prove that they obtained consent from the traditional communities could be added into the patent law system. A second approach may be to document and publish traditional knowledge as searchable prior art, as a result any patent based thereupon would not be novel and as such revocable even if it is obtained. Thirdly, a requirement of morality may be used in order to protect traditional knowledge. Visser²²⁰ is of the opinion that any exploitation which occurs after the piracy of traditional knowledge would as such be tainted by immorality and the resulting intellectual property right should as a consequence be unenforceable. Visser's article²²¹ was written before the Biodiversity Act²²² came into force. This Act now provides specific guidance where traditional knowledge and biodiversity are concerned and this has

²¹⁷ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687 at 660.

²¹⁸ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687 at 661.

²¹⁹ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687 at 662-666.

²²⁰ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687 at 665.

²²¹ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687.

²²² South African National Environmental Management: Biodiversity Act 10 of 2004.

subsequently been implemented in patent law. This may be viewed as a positive step towards protecting traditional knowledge under private property law, at least as far as patents based on traditional knowledge are concerned.

Visser²²³ explores trademark law mechanisms in the second form of traditional knowledge protection. New Zealand, South Africa and the United States have similar sections in their respective trademark laws that prohibit the registration of distinctive signs as trademarks if it may offend a section of the community or falsely suggest a connection between the sign and a community. Finally, Visser²²⁴ discusses the possibilities for the protection of traditional cultural expressions such as paintings; music; stories; designs in woven textiles; secret or sacred traditional cultural expression; and words from the indigenous communities which have been registered as trademarks by outsiders. He explores the value of copyright for the protection of these cultural expressions. This approach has certain advantages, the strongest being that copyright is protected on the basis of the principle of national treatment. However, the disadvantage is that traditional cultural expressions do not fit easily into the copyright concept. Firstly, traditional cultural expressions are often not fixed, but are the result of a slow creative process exercised by a specific community by successive replication. By contrast, in order for works to be protected by copyright, some degree of individual originality is required. Secondly, copyright focuses on the author. By contrast, with traditional cultural expressions, the notion of an author as required in copyright is usually absent.²²⁵ The next problem is the fixed term of copyright, which is generally determined by reference to a particular author. The fact that there is no one readily identifiable author of traditional cultural expression causes problems when applying the copyright concept. Furthermore, traditional cultural expressions are not fixed, but continue to evolve. Consequently, the idea of a fixed term of protection does not provide for traditional cultural expressions.²²⁶

²²³ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687 at 666.

²²⁴ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687 at 667-668.

²²⁵ See Zemer L "'We-intention" and the limits of copyright' (2006) 24 *Cardozo Arts & Ent LJ* 99-120, where the limits of copyright is discussed, specifically regarding the way that the requirement of a specific author for the subsistence of copyright does not make provision for collective culture.

²²⁶ Visser C 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *SA Merc LJ* 656-687 at 669-670.

Visser²²⁷ specifically examines the protection afforded to biodiversity in this context. He points out that it is vital to make a distinction between traditional ecological knowledge and genetic resources. He explains that

‘traditional knowledge is the product of human invention and creation, whereas genetic resources are, in a certain sense, given by nature. Yet many of the instances of the appropriation and exploitation of traditional knowledge involve the use of both genetic resources and traditional ecological knowledge about the properties of such resources’.²²⁸

Further, he states that the economic significance of the traditional knowledge is considerable. According to one estimate, the ability to locate plants with medicinal uses increases four hundred fold with the use of these knowledge systems.²²⁹ Visser further discusses three levels of *sui generis* protection afforded to biodiversity and genetic resources, and the interaction with patent law. The discussion covers protection on an international, regional and national level. On an international level, there are the Convention on Biological Diversity²³⁰ (CBD) and TRIPS.²³¹ ‘The CBD has three main objectives: the conservation of biological diversity, the sustainable use of its components, and the equitable sharing of benefits arising from the use of these genetic resources (article 1).’²³²

The South African Intellectual Property Laws Amendment Bill of 2007 or so-called Traditional Knowledge Bill was published recently. The Traditional Knowledge Bill would amend existing intellectual property categories to include traditional knowledge if it were to come into operation. The Traditional Knowledge Bill²³³ has the aim of including traditional knowledge under the existing statutes governing the law of performers, copyright, trademarks, geographical indications and designs, similar to the way traditional knowledge has been included under the Patents Act 57 of 1978. This Traditional Knowledge Bill amends the definitions in these acts so as to explicitly include traditional knowledge as a form of a performance, copyrighted work, trademark, geographical indication or design in each of the acts. Furthermore, the Traditional Knowledge Bill provides for the creation of a National

²²⁷ Visser C ‘Biodiversity, bioprospecting, and biopiracy: A prior informed consent requirement for patents’ (2006) 18 *SA Merc LJ* 429-439.

²²⁸ Visser C ‘Biodiversity, bioprospecting, and biopiracy: A prior informed consent requirement for patents’ (2006) 18 *SA Merc LJ* 429-439 at 431.

²²⁹ Shiva V *Biopiracy: The Plunder of Knowledge and Nature* (1997).

²³⁰ Accessible at <http://www.biodiv.org/convention/convention.shtml> (last visited 23 June 2010).

²³¹ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994 (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²³² Visser C ‘Biodiversity, bioprospecting, and biopiracy: A prior informed consent requirement for patents’ (2006) 18 *SA Merc LJ* 429-439 at 432.

²³³ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

Council for Traditional Intellectual Property, which will play an advisory role. A national database for traditional intellectual property will also be created in terms of the Traditional Knowledge Bill, with the purpose of making traditional works searchable. Furthermore a National Trust Fund would be created for the payment of royalties. Any commercial use of traditional works on the national database would be subject to the payment of royalties and these funds would be applied for the benefit of indigenous communities.

However, the Traditional Knowledge Bill²³⁴ has been widely criticised by South African intellectual property experts such as Dean²³⁵ and Judge Harms²³⁶ of the Supreme Court of Appeal. Even though Dean²³⁷ agrees that traditional knowledge should be protected, he argues that protection should be afforded through new *sui generis* legislation which has the objective of protecting traditional knowledge. The core of such legislation would be to prevent anyone from using any traditional knowledge without the payment of royalties to the indigenous community who holds the traditional knowledge. He holds that the system of intellectual property is not suited to the needs of traditional knowledge, since traditional knowledge has been in existence for a long time and it is hard to determine who the creator is.²³⁸ Apart from these problems there are also technical errors, inconsistencies and anomalies in the Traditional Knowledge Bill.²³⁹ For example, the amendment to the Copyright Act 98 of 1987 would have the result that only traditional works created on or after the date of commencement of the Traditional Knowledge Bill or within a period of fifty years before its commencement would be protected. This has the result that most traditional knowledge works would remain unprotected, since they were created long before that.

Judge Harms²⁴⁰ also takes issue with the Traditional Knowledge Bill²⁴¹ on the fact that the descendants of the original creators of the traditional knowledge could not be considered the authors. He also notes that the fact that such knowledge was created long ago and that

²³⁴ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

²³⁵ Dean OH 'Where angels fear to tread' (2009) Feb *Without Prejudice* 18-19 and Dean OH 'Red card' (2009) Sep *Without Prejudice* 17-20.

²³⁶ Harms LTC 'A few negative trends in the field of intellectual property rights' (2009) 72 *THRHR* 175-191.

²³⁷ Dean OH 'Red card' (2009) Sep *Without Prejudice* 17-20 at 20.

²³⁸ Dean OH 'Red card' (2009) Sep *Without Prejudice* 17-20 at 17.

²³⁹ Dean OH 'Red card' (2009) Sep *Without Prejudice* 17-20 at 20.

²⁴⁰ Harms LTC 'A few negative trends in the field of intellectual property rights' (2009) 72 *THRHR* 175-191 at 184.

²⁴¹ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

copyright is usually only the length of the author's life plus fifty or seventy years is problematic.²⁴² Copyright is also territorial and would not be enforceable in other countries unless specific international agreements are concluded.²⁴³ Furthermore, it is only the original work that would be eligible for copyright and it would be nearly impossible to determine which version would be the original version of traditional knowledge.²⁴⁴ Judge Harms²⁴⁵ also notes many anomalies in the Patents Amendment Act 20 of 2005. For example, if a person wishes to patent an invention making use of knowledge about the Hoodia plant, an agreement with the indigenous community is necessary, although this would not be required for an invention patented worldwide. The same problem would be present in the amendment to the Trade Marks Act 194 of 1993, since trademarks would only be protected in the country where it was registered.²⁴⁶

However, despite the problems that still need to be addressed before the Bill could become legislation, this Traditional Knowledge Bill²⁴⁷ indicates that South Africa is moving towards protecting traditional knowledge as property. It would also be useful to include traditional knowledge under the constitutional property clause. Although the South African Bill of Rights also provides for the protection of cultural rights, this would possibly deal only with the moral aspects of traditional knowledge and not give local communities access to monetary benefits from intellectual property products derived from traditional knowledge. This may only be achieved through property-based protection.

As a developing country, South Africa needs to protect its natural and cultural resources against exploitation by foreign corporations. As explained, there are many possibilities for the facilitation of this protection. The Biodiversity Act 10 of 2004 and the Patents Amendment Act 20 of 2005 already give protection to certain forms of traditional knowledge and

²⁴² Harms LTC 'A few negative trends in the field of intellectual property rights' (2009) 72 *THRHR* 175-191 at 175-176.

²⁴³ Harms LTC 'A few negative trends in the field of intellectual property rights' (2009) 72 *THRHR* 175-191 at 176.

²⁴⁴ Harms LTC 'A few negative trends in the field of intellectual property rights' (2009) 72 *THRHR* 175-191 at 176.

²⁴⁵ Harms LTC 'A few negative trends in the field of intellectual property rights' (2009) 72 *THRHR* 175-191 at 186.

²⁴⁶ Harms LTC 'A few negative trends in the field of intellectual property rights' (2009) 72 *THRHR* 175-191 at 190.

²⁴⁷ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

biological and genetic resources. The Traditional Knowledge Bill of 2007²⁴⁸ has the purpose to make provision for the protection of traditional knowledge within the other existing categories of intellectual property, namely copyright, trademarks and geographical indications. Therefore South African law already protects certain forms of traditional knowledge under the existing intellectual property categories and consequently also as property under private law. The process to include all aspects of traditional knowledge under existing intellectual property categories is already in motion. As a result traditional knowledge should readily be accepted as property under the constitutional property clause.

3 8 Commercial Property

The private law-recognised categories of intellectual property (patents, copyright, trademarks and designs) discussed in Chapter 2 (Traditional Immaterial Property Interests) constitute one kind of commercial property. This is the least controversial form of commercial property. ‘Since these rights are creatures of statute and established in accordance with a special statutory regime, the requirement is usually that the right should be established and vested according to the applicable statutory prescriptions before it will be recognized and protected under the constitutional property clause.’²⁴⁹ The general rule is that an intellectual property right will be recognised and protected under the property clause provided that these requirements were met.²⁵⁰ Intellectual property rights are not explicitly mentioned in the Constitution under a separate right, ‘since they are generally understood to be included in the usual generic reference to property’.²⁵¹

However, there are also more controversial categories of commercial interests. Some of these interests receive private law protection via legislation or common law, but not as property; and there is no other heading other than the property clause under which they could possibly obtain constitutional protection. Furthermore, these commercial interests share the kind of characteristics with property and intellectual property that renders constitutional protection necessary for the same reasons. These commercial interests are debts and claims; shares;

²⁴⁸ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

²⁴⁹ Van der Walt AJ *Constitutional Property Law* (2005) 95. Also see Van der Walt AJ ‘Police-power regulation of intangible property and the constitutional property clause: A comparative analysis of case law’ in Jackson P & Wilde DC (eds) *Property Law: Current Issues and Debates* (1999) 208-280 at 256.

²⁵⁰ Van der Walt AJ *Constitutional Property Law* (2005) 95.

²⁵¹ Van der Walt AJ *Constitutional Property Law* (2005) 96.

goodwill; and state-granted licenses, permits and quotas.²⁵² Although they all fall under the broader category of commercial property interests, these interests are not all treated similarly in constitutional law.

In most jurisdictions, debts and claims that sound in money are generally recognised as constitutional property.²⁵³ Two different kinds of debt need to be distinguished, namely private debts and similar claims; and debts against the state. Private debts are generally protected as property in constitutional law, while debts against the state are more controversial. In the area of private debts, the question is most often whether regulatory action that cancelled these kinds of debts should be regarded as deprivation or rather as expropriation where compensation should be payable. The question regarding state debts has more to do with the definition of expropriation than that of property and pertains to situations where debts against the state were cancelled by state action, without compensation.²⁵⁴ It is generally accepted that state debts are recognised and protected as constitutional property.

In Australian constitutional law, the principle was developed that the state acquires property compulsorily if it derives any kind of benefit and not merely when the property is taken from the owner as such. In other words, even if that which the state gains is not identical to what the property owner loses, there would still be a compulsory acquisition, provided that the state debt was in fact recognised as constitutional property.²⁵⁵ Van der Walt²⁵⁶ submits that it is not meaningful to compensate the property owner for the cancellation of the debt. The only remedy would be for the state action to be declared unconstitutional and invalid; thereafter the debt would once again become payable.

Shares in companies form a special category of contract-based personal rights protected in private law. Even in jurisdictions where shares are not accepted as property in private law,

²⁵² Van der Walt AJ *Constitutional Property Law* (2005) 94-101.

²⁵³ Van der Walt AJ *Constitutional Property Law* (2005) 96. See *BVerfGE* 42, 263 [1976] (*Contergan* case) and *BVerfGE* 83, 201 [1991] (*Vorkaufsrecht* case) (Germany); *Phillips v Washington Legal Foundation* 524 US 156 (1999) and *Webb's Fabulous Pharmacies v Beckwith* 449 US 155 (1980) (US); and *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 and *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155 (Australia). Also see Van der Walt AJ 'Police-power regulation of intangible property and the constitutional property clause: A comparative analysis of case law' in Jackson P & Wilde DC (eds) *Property Law: Current Issues and Debates* (1999) 208-280 at 216-228.

²⁵⁴ See Van der Walt AJ *Constitutional Property Law* (2005) 96-98. Also see *Peverill v Health Insurance Commission* (1991) 104 ALR 449 (FC) 454 (Australia) and *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZSC) (Zimbabwe).

²⁵⁵ See Van der Walt AJ *Constitutional Property Law* (2005) 97-98.

²⁵⁶ See Van der Walt AJ *Constitutional Property Law* (2005) 98.

they are generally regarded as constitutional property.²⁵⁷ In *Cooper v Boyes NO and Another*²⁵⁸ the court recognised that shares are incorporeal moveable property over which an usufruct may be established. This has made the recognition of shares as constitutional property considerably easier in South Africa.

Business goodwill is sometimes regarded as constitutional property, but such recognition has been controversial in foreign constitutional law.²⁵⁹ The purpose of recognising goodwill as constitutional property is to demonstrate the value that the state acquires when taking over a business by means of regulatory action and that compensation is necessary.²⁶⁰ This distinguishes between the two scenarios where the state merely closes a business down for regulatory purposes; and where the state takes over a business and acquires value, trading on the goodwill of the business.

More controversial forms of commercial property interests are state-granted and controlled licences, permits and quotas.²⁶¹ Intellectual property rights, debts, shares and goodwill are uncontroversial in the sense that they are generally recognised and protected as property in constitutional law even though they are not all protected as property in private law. Only intellectual property rights and possibly shares are protected as *sui generis* forms of property rights in private law. Debts are protected as personal rights under the law of contract in private law. Licenses, permits and quotas differ from the other categories of commercial property in that they are usually state-created and hence subject to state powers of cancellation, amendment and regulation. These interests are not protected in private law, not under property law and not under any other area of private law either. Often, they are not regarded as constitutional property.

Due to their origin in administrative awards, there is resistance to recognising and protecting licenses, permits and quotas as property. However, in foreign law some of these interests have enjoyed limited constitutional protection. The reason why constitutional property

²⁵⁷ See *BVerfGE* 50, 290 [1979] (*Mitbestimmung* case) (Germany) and *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 (Australia).

²⁵⁸ 1994 (4) SA 521 (C).

²⁵⁹ Van der Walt AJ *Constitutional Property Law* (2005) 98.

²⁶⁰ Van der Walt AJ *Constitutional Property Law* (2005) 99.

²⁶¹ Van der Walt AJ *Constitutional Property Law* (2005) 100. Also see Van der Walt AJ 'Police-power regulation of intangible property and the constitutional property clause: A comparative analysis of case law' in Jackson P & Wilde DC (eds) *Property Law: Current Issues and Debates* (1999) 208-280 at 248-253.

protection is sought for these interests is because they may acquire commercial value, especially when they can be sold and transferred. Such licenses, permits and quotas will usually only be regarded as property if they have commercial value and have vested and been acquired in line with the relevant requirements as set by statute or regulation. It becomes apparent that licenses, permits and quotas may be protected as constitutional property if they display certain characteristics that may be analogised to property, namely that they have acquired value and have vested according to the relevant statutory or regulatory requirements. There is no other constitutional right that could provide protection for these interests; therefore application of the property clause may be suitable if the interests conform to these strict requirements. Even though licenses, permits and quotas may be recognised and protected as property for constitutional purposes, they are still subject to administrative regulation, amendment and cancellation.²⁶²

The two main requirements that determine which commercial property interests may be recognised and protected as constitutional property appear to be that they must be vested and acquired in terms of statutory or regulatory requirements and they must have intrinsic or acquired value. Intellectual property rights are vested and acquired once the statutory requirements for the particular kind of intellectual property have been met. In the case of patents, this means that requirements must be met and the patent must be registered. In the case of copyright, no registration is necessary and conforming to the requirements is sufficient to gain private law property protection and hence also constitutional property protection. Intellectual property rights already have value and do not need to acquire value before gaining constitutional property protection as is the case with licenses, permits and quotas. For shares and business goodwill, there are also certain statutory or regulatory requirements that have to be met before the right is vested and acquired. Shares and goodwill also need to acquire value before they would be protected as constitutional property. The same is true for licenses, permits and quotas. In all of the cases, there is no other constitutional property clause that could possibly provide constitutional protection for these interests.

²⁶² Van der Walt AJ *Constitutional Property Law* (2005) 100-101.

3 9 Participatory Claims

The so-called ‘new property’ refers to participatory claims against state welfare and social benefits.²⁶³ Van der Walt²⁶⁴ states that welfare payments and subsidies are not generally considered property, but in certain instances pension interests and similar interests may be regarded as property. Constitutional practice varies in this regard. These interests are generally not accepted as property in private law, but may be recognised and protected in constitutional law if they display certain characteristics that cause them to be treated as analogous to property. These characteristics are that they have vested and been acquired in terms of statutory or regulatory requirements and have acquired value. However, this category of unconventional immaterial property interests differs from the previous ones regarding constitutional protection, since the South African Constitution includes express provisions for the protection of welfare benefits or socio-economic rights.

German courts have formulated three requirements for the inclusion of a public-law participatory right as constitutional property. The public-law entitlement must accrue to the beneficiary exclusively, as the case would be with a right in private law; the entitlement must be based on the beneficiary’s own or personal efforts; and the entitlement should have the purpose to ensure the beneficiary’s own survival. The mere fact that a beneficiary has contributed to receive the entitlement does not automatically mean that the interest will be included under constitutional property.²⁶⁵ These requirements serve to strike a balance between the public interest and the individual’s interests. Once a public-law participation right is recognised as property, it is protected the same as all other constitutional property. The normal principles applying to constitutional property is applicable, namely that only concrete rights are protected and not wealth in general; and secondly that only vested and acquired rights are recognised.²⁶⁶

Reich’s argument²⁶⁷ that certain intangible interests should be recognised as constitutional property influenced the United States law regarding the recognition of social and welfare

²⁶³ Van der Walt AJ *Constitutional Property Law* (2005) 101.

²⁶⁴ Van der Walt AJ *Constitutional Property Law* (2005) 101.

²⁶⁵ Van der Walt AJ *Constitutional Property Law* (2005) 101. See *BVerfGE* 69, 272 [1985] (*Eigenleistung* case). Compare Kleyn DG ‘The constitutional protection of property: A comparison between the German and the South African approach’ (1996) 11 *SA Public Law* 402-445 at 421.

²⁶⁶ Van der Walt AJ *Constitutional Property Law* (2005) 102.

²⁶⁷ Reich CA ‘The new property’ (1964) 73 *Yale LJ* 733-787 at 733.

rights. Reich²⁶⁸ argued that the traditional forms of property are steadily being replaced by valuables dispensed by government and furthermore that these forms of government largess are influencing the workings of the Bill of Rights. He names a number of forms of what he terms ‘government largess’ such as jobs; occupational licenses; franchises; contracts; subsidies; use of public resources; and public services.²⁶⁹ He argues that these participatory rights should be included as constitutional property. Courts have accepted this argument as far as it concerns the due process clause of the property guarantee, but not for purposes of the takings clause.²⁷⁰

The question of ‘new property’ has only been posed to South African courts twice in constitutional property law. In *Transkei Public Servants Association v Government of the Republic of South Africa and Others*²⁷¹ the Transkei High Court observed in passing that the meaning of the 1993 Constitution was probably wide enough to include a state housing subsidy. This note can only serve as persuasive authority. In the second case²⁷² the question was posed to the Constitutional Court. The Court held that certain conditions of service relating to payment were in line with section 28 of the 1993 Constitution. However, the Court did not ask directly whether the payments in question were actually property for constitutional purposes. Van der Walt²⁷³ notes that it is dangerous and complicated to treat socio-economic interests as property, since legitimate reform may be frustrated if courts protect these interests too easily and rigidly against regulation and amendment. He also states that the ‘new property’ question has not been raised in any of the important cases deciding on social and economic rights.

The reason for this is that the Bill of Rights explicitly protects socio-economic rights in a number of separate provisions.²⁷⁴ Van der Walt hence proposes that in future it is unlikely that socio-economic rights would be protected or adjudicated in terms of the property clause.

²⁶⁸ Reich CA ‘The new property’ (1964) 73 *Yale LJ* 733-787 at 733.

²⁶⁹ Reich CA ‘The new property’ (1964) 73 *Yale LJ* 733-787 at 734-737.

²⁷⁰ Van der Walt AJ *Constitutional Property Law* (2005) 103. See *Goldberg v Kelly* 397 US 254 (1970).

²⁷¹ 1995 (9) BCLR 1235 (Tk) 1246-1247.

²⁷² *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC) paras 41-44.

²⁷³ Van der Walt AJ *Constitutional Property Law* (2005) 105.

²⁷⁴ Sec 24 (environment), sec 26 (housing), sec 27 (health care, food, water and social security), sec 28 (children’s rights), sec 29 (education), sec 30 (language and culture) and sec 31 (cultural, religious and linguistic communities) of the Bill of Rights.

He also notes that the term ‘new property’ should be avoided in South Africa, since it encompasses two distinct categories, namely commercial property and welfare rights. Since commercial property such as licences, permits and quotas may be protected as property in terms of the South African Constitution, but not welfare rights, it is advisable to keep these categories separate.²⁷⁵ Welfare rights are not included under private property law and also not under constitutional property law, while commercial property may be included under the constitutional property concept under certain strict requirements as mentioned.

3 10 Non-proprietary Rights

In both German and South African private law, the property concept is closely linked to ownership, which is usually contrasted with other, lesser interests such as a lease or a bond. As a result, the narrow private law (ownership-based) concept of property excludes important, commercially valuable property interests such as leases. However, legislation or private law rules correct this shortcoming by strengthening the protection of these non-proprietary rights for purposes of private law.²⁷⁶ In the area of constitutional law, a wider property concept is employed, including non-proprietary rights and interests, even in Roman-Germanic systems such as South African and German law.

Van der Walt²⁷⁷ argues that the concept of property in private law restricts the property clause unduly. If the property clause encompasses incorporeal rights and interests, it would be illogical to restrict property rights to a specific kind of property interest, namely ownership.²⁷⁸ The German Federal Constitutional Court²⁷⁹ recently confirmed that article 14 GG (the property clause) of the Basic Law of the Federal Republic of Germany 1949 protects the possessory right of a lessee of immovable property. This case illustrates the fact that the property concept is interpreted widely in constitutional law, providing protection for property rights other than ownership, even where such protection is afforded against the property owner. This decision means that the rights of different persons regarding the same object may qualify as property in constitutional law. This conclusion may be justified in constitutional law as long as ‘property’ is not restricted to ownership.²⁸⁰ German courts answer the question whether a particular interest will be included under the constitutional property concept or not

²⁷⁵ Van der Walt AJ *Constitutional Property Law* (2005) 105-106.

²⁷⁶ Van der Walt AJ *Constitutional Property Law* (2005) 88.

²⁷⁷ Van der Walt AJ *Constitutional Property Law* (2005) 88-89.

²⁷⁸ Van der Walt AJ *Constitutional Property Law* (2005) 88-89.

²⁷⁹ *BVerfGE* 89, 1 [1993] (*Besitzrecht des Mieters* case).

²⁸⁰ Van der Walt AJ *Constitutional Property Law* (2005) 89.

by reference to ‘the question whether in- or exclusion will serve the creation of a sphere of personal freedom which will allow the individual person to take responsibility for the development and management of her own affairs in the social context’.²⁸¹ In terms of this guideline, sensitive and socially important non-proprietary rights have received constitutional property protection.²⁸²

Whether a particular non-proprietary right may be included under the constitutional property concept often depends ‘on issues regarding the separate or independent existence of the right and its vesting in or acquisition by the property holder according to normal law’.²⁸³ This corresponds with the requirements for commercial property to qualify as constitutional property. In instances where a specific non-proprietary interest is ‘generally accepted or recognised as an independent right in private or commercial law, or when it is socio-economically or constitutionally justified to recognise and protect the right or interest as such although it is not necessarily recognised in private law, and provided that the claimant acquired the right according to the legal rules that control the existence of the right’,²⁸⁴ the right may enjoy constitutional property protection.

3 11 Conclusion

From this analysis it becomes apparent that different interests of diverse stakeholders need to be considered in determining the scope of immaterial property and the protection afforded these rights. What also becomes apparent is that immaterial property interests do not fall into a neat category of property that is free of policy and considerations of justice. The aspects of traditional knowledge appropriation and enclosure of the commons need to be considered thoroughly before granting constitutional protection to immaterial property and more specifically intellectual property as the law stands. There are many factors that need to be weighed up in reaching the decision whether immaterial property interests should be protected and to what extent. The questions of whose interests should be protected and what aspects of immaterial property should be protected also arise.

This chapter dealt with the unconventional immaterial property interests. The question was which of the unconventional immaterial property interests may be protected under the

²⁸¹ Van der Walt AJ *Constitutional Property Law* (2005) 90.

²⁸² Van der Walt AJ *Constitutional Property Law* (2005) 94.

²⁸³ Van der Walt AJ *Constitutional Property Law* (2005) 94.

²⁸⁴ Van der Walt AJ *Constitutional Property Law* (2005) 94.

constitutional property clause. Certain of these unconventional immaterial property interests are protected in private law but not under property law, while others are not yet protected in private law at all. The interests share certain characteristics such as economic value and scarcity with property and intellectual property and hence it should be possible to recognise and protect at least some of them under the constitutional property clause, as indicated by the analysis in this chapter.

The overarching question was under which circumstances and in terms of which requirements it would be possible to recognise and protect these unconventional immaterial property interests under the constitutional property clause, similar to the way tangible property and intellectual property are protected. With the exception of public participatory rights which may be protected under the constitutional provisions for socio-economic rights, there is generally no constitutional provision except for the constitutional property clause that could possibly provide adequate protection for these interests. Traditional knowledge could possibly be protected under the provision for cultural rights, although this would not provide protection for any form of remuneration.

Commercial information does not fall into any property category in private law. However, commercial information could be protected under the constitutional property clause if certain strict requirements are met. The issue whether commercial information may be regarded as property may be determined with reference to the concept of excludability, in other words whether other persons may be prevented from obtaining or utilising the information. Where the creator of the information took no steps to prevent other persons from using the information, the information is said to be non-excludable and as such is unsuitable to be the object of property rights. Where steps were taken to prevent access to the information, the owner may be protected by the law of unlawful competition in the event of competitors using the information for commercial purposes. Therefore, the inclusion of commercial information as constitutional property may be suitable under certain circumstances, namely where such information may be deemed excludable and the gatherer of the information took certain steps to exclude persons from using the information. If no such steps were taken or if the information is deemed to be morally non-excludable, then constitutional inclusion of the interest would most likely also be unsuitable.

It is not possible to gain excludability for commercial information by utilising statutory provisions for the intellectual property category of copyright, since there may be no copyright in ideas. Contractual protection constitutes the only possibility in terms of which excludability may be created for interests in commercial information. Although commercial information may only be protected under the law of contract in private law and not the law of property, these interests arguably involve property-like patrimonial interests. Consequently it is suitable for commercial information to be recognised and protected as property under the South African constitutional property clause. As long as these commercially valuable interests are vested and acquired in terms of the requirements for contractual protection, there should be no reason why South African courts would refuse to recognise and protect commercial information as constitutional property.

Confidential information is often linked to insider trading and the question whether it should be allowed or not. In South Africa insider trading is prohibited, therefore a person would not be allowed to keep profits made by way of insider trading. Such profits are prohibited and therefore not protected in private law as property or under any other area of the law. These interests should consequently also not be protected in constitutional property law. However, there is the possibility that the ‘owners’ of confidential information could have property rights in such information. South African law does not currently provide for the protection of confidential information as property in private law. Limited protection is available in terms of the legislation prohibiting insider trading under the law of obligations.

However, only once this information is recognised as property may the companies be adequately protected in situations where the information is used by unauthorised persons. However, even though confidential information is not yet protected as property in private law, there is certainly scope for constitutional protection when the information is excludable. This may even strengthen the argument that legislation should be enacted to protect the owner’s property-like interest in confidential information. The information would probably be deemed excludable if certain measures were taken to keep the information confidential. Similar to the other forms of unconventional immaterial property, there is no constitutional clause other than the property clause that may provide protection to confidential information. Also similarly, confidential information is commercially valuable.

A trade secret is a *species* of the *genus* confidential information. Trade secrets may more readily be protected as constitutional property since specific requirements for a trade secret have crystallised from case law. The information must be capable of application in trade or industry; must be secret or confidential; and must also be of economic value to the owner. Only once these requirements are met, does the information qualify as a trade secret. The holder of a trade secret then has the right to prevent other persons from using the information. Trade secrets are not governed by statute as is the case with copyright, patents and other intellectual property; but by common law. However, they could still possibly be viewed as a *sui generis* form of intellectual property. Trade secrets are legally excludable and as such should qualify as property in private law. Yet in the unlikely event that this is not the case, immaterial property interests in trade secrets could still be included as constitutional property. This would be the case if certain strict requirements are met. The trade secret must be vested and acquired in terms of the requirements for a trade secret. One of the requirements is that the trade secret must be held secret, in other words it must be excludable. Another important requirement is that it must be of economic value. These are characteristics shared by all intellectual property categories and also other categories of property and it is for this reason that constitutional property protection would be suitable for the protection of the immaterial property interests in trade secrets.

Digital copyright merely embodies one troublesome aspect of copyright protection. This dilemma arrived along with the World Wide Web. This new technology has enabled copyright piracy on a scale that the current law of copyright is unable to address sufficiently. This is in reality not an entirely new form of immaterial property, but digital copyright needs some form of legislation to regulate digital copying more effectively than what traditional copyright is currently able to do. Copyright legislation was designed with the protection of tangible copies of a work in mind and not unlimited digital online copying. At the moment, authors are reverting to ‘anti-copy’ devices in order to protect their works. These devices prevent expansion of the intellectual commons by blocking access in cases where materials should be available for utilisation in line with the ‘fair use’ exception. This constitutes additional contract-based protection that authors use in order to maintain legal excludability of the copyrighted works. Since copyright is an existing form of intellectual property, digital copyright already forms part of property under private law and therefore constitutional protection of this right as a form of property is possible.

As with all copyright works, traditional and digital, a balance needs to be maintained between protection of the owner's property interest and the public's interest in access to the work. Constitutional protection of these interests could be particularly useful to create a balance between the interests of digital copyright owners and interests in the public domain. In this case the owners already have legal excludability in the form of contracts to their disposal. However, specific legislation dealing with this aspect would be useful since the current copyright legislation was not designed with digital copyright in mind and the contractual protection may interfere with copyright exclusions such as fair use.

Biotechnological products are created with the assistance of new technologies. The creations are generally protected under the intellectual property category of patents, but the patent system is not fully equipped to deal with these new technologies and as such needs updating. In the alternative, a new set of legislation may be created in order to govern biotechnological products and to prevent the stagnation of the intellectual property commons. There are many other interests other than property interests at stake in these cases where biotechnological products are derived from human body parts such as cells. Therefore it would be particularly useful to include the biotechnological products (that are not prohibited by way of legislation) under the constitutional property clause. This would allow for a balance to be created between property interests and other interests such as the commons, privacy and the right to bodily integrity. In some instances the other interests may be deemed so important that a particular biotechnological interest would be deemed morally non-excludable.

Traditional knowledge is another form of intellectual creation that poses challenges to the current intellectual property system. No private law protection is currently available for the protection of immaterial property interests in traditional knowledge, neither under property law nor under any other area of law. Companies use the knowledge of indigenous peoples in order to develop patents. Traditional designs and other cultural products are also appropriated and used in works of copyright and trademarks. In doing so the knowledge is treated as part of the intellectual property commons and the creative effort of traditional communities is disregarded. Companies that exploit these products often give no benefit, financial or otherwise, to the traditional communities that developed the traditional knowledge. As such the intellectual property system is currently being used to exploit traditional communities. Some reform is required in order to protect traditional knowledge as property or by other means.

In South Africa, some reform is already in motion since the Biodiversity Act 10 of 2004 and the Patents Amendment Act 20 of 2005 have been implemented to give property-based protection to traditional knowledge used in the creation of patents. The Traditional Knowledge Bill²⁸⁵ has the purpose to include traditional knowledge under other existing categories of intellectual property. Even though there are still many challenges posed to the Bill in its current form, the process of including traditional knowledge under all existing intellectual property categories is already in motion. In South Africa there is also the possibility to protect traditional knowledge as constitutional property despite the difficulties of fitting traditional knowledge into the conventional intellectual property categories, since constitutional law traditionally employs a wider property concept than private law.

It appears that commercial property may or may not enjoy constitutional protection depending which specific category is at issue. Intellectual property or traditional immaterial property is the least controversial form of commercial property. As discussed in Chapter 2 (Traditional Immaterial Property Interests) and this chapter, intellectual property rights should be recognised and protected under the constitutional property clause since they are recognised and protected as property in private law. The constitutional property concept should include at least interests that are accepted as property in private law, although the concept is not limited to these interests. More controversial commercial interests are debts and claims; shares; goodwill; and state-granted licenses, permits and quotas.

Debts and claims that are based in contractual rights are recognised and protected as constitutional property in most jurisdictions. Shares are also recognised and protected as constitutional property, even in jurisdictions where they are not recognised as property in private law, but only as contractual rights. In South African law, shares have been accepted as property in private law, which simplifies the question somewhat. Business goodwill is not readily recognised and protected as constitutional property. However, in foreign jurisdictions where this has been done, the purpose was to distinguish between the regulation of businesses and cases where the state benefitted from closing down a business. The goodwill serves as the visible aspect of the benefit gained by the state.

²⁸⁵ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

Licenses, permits and quotas are usually state-created and hence subject to state powers of cancellation, amendment and regulation. They originate in administrative awards; therefore there is resistance to recognising and protecting licenses, permits and quotas as property. However, these interests may be protected as constitutional property in cases where they share certain characteristics with property, namely that they have acquired value and have vested according to the relevant statutory or regulatory requirements. This is also true for all the other forms of commercial property. There is no other constitutional clause that could provide protection for any of the commercial property interests other than the property clause. These interests are not specifically excluded from the property clause and there appears to be no specific reason why they should be excluded. Therefore, the South African Constitutional Court may in future grant constitutional property protection to these interests.

Participatory claims could in theory enjoy constitutional property protection as long as the rights have vested and been acquired and the interests have acquired value. German law also sets the additional requirement that some form of own contribution should be evident. In South African law it is unlikely that these interests would be protected under the property clause, since the constitutional socio-economic rights provisions explicitly provide protection for participatory claims or welfare rights. In this way, participatory claims differ from all the other traditional and unconventional immaterial property interests in that the property clause is not the only option for constitutional protection.

There are furthermore certain property rights other than ownership that may be protected. Such a right would be recognised and protected under the constitutional property clause provided that the non-proprietary interest is ‘generally accepted or recognised as an independent right in private or commercial law, or when it is socio-economically or constitutionally justified to recognise and protect the right or interest as such although it is not necessarily recognised in private law’.²⁸⁶ A further requirement is that the claimant must have acquired the right in terms of the legal rules that control the existence of the right.

Certain of these interests are already protected as property in private law, but the protection is not adequate. Digital copyright and biotechnological products fall into this category. There have also been arguments to include trade secrets as a *sui generis* category of intellectual

²⁸⁶ Van der Walt AJ *Constitutional Property Law* (2005) 94.

property. Some of these immaterial property interests are not traditionally included as property in private law, but are protected under other areas of private law, notably the law of contract and obligations. These interests are commercial information, confidential information and commercial property and non-proprietary rights. Others are not protected under any area of private law, notably traditional knowledge and participatory claims. Here there is an extra question, namely whether the interests should be protected at all, whether in private or constitutional law.

Participatory claims are different from all the other traditional and unconventional immaterial property interests in that they are explicitly provided for in the constitutional clauses pertaining to socio-economic rights. For all the other traditional and unconventional immaterial property interests there is no constitutional clause other than the property clause that could possibly provide protection against state interferences and interferences by the rights of other persons. All of the interests discussed in this chapter share certain characteristics with property under certain circumstances and for this reason it would be suitable to recognise and protect them as property for constitutional purposes. If these characteristics are visible in a particular immaterial property interest, then it should be possible to grant constitutional property protection, at least in principle.

Firstly, an immaterial property interest may never be recognised as property if it is morally non-excludable. This would be the case if it is very important for a specific interest to remain in the public domain. An example would be gene sequences. An interest must be at least physically or legally excludable in order to be recognised as property in either private or constitutional law. None of the immaterial property interests are physically excludable. They can only become legally excludable by the utilisation of particular legal mechanisms. Intellectual property rights or the traditional immaterial property interest may become legally excludable if the owner utilises the applicable intellectual property legislation. Some of the other interests may become legally excludable by utilising mechanisms from the law of contract. If the available mechanism were not utilised, no property protection would be available, either via private law or constitutional law.

An interest must have accumulated value in order to be protected as property in constitutional law. The right must have vested and been acquired in terms of the applicable legislation or rules. For example if an interest is protected by the law of contract, the rules must have been

complied with and the right to claim something must have vested in the person claiming constitutional property protection. In addition to the guidance provided by the characteristics shared with property, immaterial property interests may be termed property or not according to which theories for their justification are being used. These justifications will be discussed in detail under Chapter 4 (The Value of Intellectual Property).

Chapter 4: The Value of Immaterial Property

4.1 Introduction

The question that this dissertation deals with is whether immaterial property interests may be included under the property concept for purposes of the constitutional property clause. It is unavoidable that the question whether protection for these interests may be justified at all; and if so under which particular circumstances; also arises. As such, this chapter aims to analyse and discuss the reasons why traditional immaterial property interests¹ as well as unconventional immaterial property interests² should be protected, both in private law and in constitutional law. The classical property theories and some newer theories appear to justify protection of traditional immaterial property interests or intellectual property rights, but it is more problematic to extend this line of argument to some of the unconventional forms of immaterial property interests. Furthermore, in some instances there may be other theories that could be more relevant for the justification of unconventional immaterial property interests. For example, the protection of traditional knowledge may be better justified by theories of distributive justice than by conventional property theories.

The protection of unconventional categories of immaterial property that are not protected as property in private law but under other areas of private law or in public law, cannot be justified by property theories and it is also unnecessary to do so, since the only question is whether these interests may be recognised and protected under the constitutional property clause and this is not determined by reference to property or other theories. Rather, these interests could be protected under the property clause because they share certain characteristics with intellectual property and tangible property; and there is no other constitutional clause that could provide protection to these interests. The first unconventional immaterial property category that is not considered is commercial property, namely debts and claims; shares; goodwill; and state-granted licenses, permits and quotas. These interests already receive protection in private law, under areas other than property law. Therefore it is both unnecessary and impractical to consider these interests in terms of the property theories.

¹ Chapter 2 (Traditional Immaterial Property Interests) defines these interests as patents, copyright, designs and trademarks.

² Chapter 3 (Unconventional Immaterial Property Interests) defines these interests as commercial information, confidential information, trade secrets, digital copyrights, biotechnological products, traditional knowledge, commercial property, participatory claims and non-proprietary rights.

There may be other theories for the justification of protection for these interests, but for the purposes of the research question, it is only important to determine whether these interests may be recognised and protected under the constitutional property clause and this is discussed in Chapter 5 (Immaterial Property Interests in the Constitution). The reason why it is desirable to recognise these interests as property for constitutional purposes is because they share certain characteristics with property and intellectual property and there is no other constitutional clause that could provide the necessary protection. The second category of interests that needs no consideration under property theories entails participatory claims that are recognised and protected under separate constitutional property clauses specifically aimed at socio-economic rights. Therefore it is unlikely that these interests would be adjudicated in terms of the property clause. Finally, this chapter has the purpose of discussing and analysing the impact of immaterial property interests on the public domain and other public and private rights that may be affected by immaterial property rights.

Drahos³ notes that intellectual property rights are relations between individuals, as is the case with other property rights. Intellectual property law, however, pertains to rights in abstract objects. A lot is at stake where the concept of property is extended to include abstract objects. Therefore Drahos⁴ argues that it is necessary to ask whether the legal recognition and protection of intellectual property may be explained and justified by utilising general property theories or whether a distinctive theory of intellectual property needs to be developed.⁵ Drahos⁶ suggests that intellectual property should be approached in terms of property rights instead of treating it in terms of the language of privileges. Hettinger notes that '[i]ntellectual property is an increasingly significant and widespread form of ownership'.⁷ He states that the manufacture of physical goods is increasingly being replaced by the production and use of information in what is termed the arrival of the 'post-industrial society'. As a result, the laws and rules protecting intellectual property are increasingly strained.⁸ Hettinger⁹ and Drahos¹⁰ agree that the institutions of intellectual property need to be scrutinised carefully. However,

³ Drahos P *A Philosophy of Intellectual Property* (1996) 1.

⁴ Drahos P *A Philosophy of Intellectual Property* (1996) 1.

⁵ Also see Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 288: 'Does the law of intellectual property reflect general theories of property?' Hughes states that in answering that question, one should keep in mind what the theory of intellectual property should be and reflect from that image what the law should be.

⁶ Drahos P *A Philosophy of Intellectual Property* (1996) 2.

⁷ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 31.

⁸ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 31-32.

⁹ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 32.

¹⁰ Drahos P *A Philosophy of Intellectual Property* (1996) 1.

Hughes¹¹ does not agree that every aspect of the intellectual property system should be tested for theoretical validity. Instead, he attempts to prove that existing intellectual property law is supported in varying degrees by the existing theories, but that the same theories may also be used to argue that the current law has certain shortcomings.

According to Hettinger,¹² one is faced by two major problems when attempting to justify the recognition and protection of intellectual property, namely the nonexclusive character of intellectual property and the restriction of the free flow of information. Hettinger explains the nonexclusive characteristic of intellectual property subject matter as follows:

‘These objects are nonexclusive: they can be at many places at once and are not consumed by their use. The marginal cost of providing an intellectual object to an additional user is zero, and though there are communications costs, modern technologies can easily make an intellectual property object unlimitedly available at very low cost.’¹³

This nonexclusive character of intellectual property would possibly constitute an example of what Gray¹⁴ would refer to as a physically non-excludable resource. However, it may still be legally excludable since there is legislation that enables the creator of the intellectual property to protect the creation. If such protection granted by legislation is not utilised, then the intellectual creation would also be legally non-excludable and no property protection would be afforded.

Hettinger¹⁵ notes that the sharing of intellectual property objects does not prevent or impair the personal use of its creator, but it does prevent the creator from exclusively selling these intellectual objects to other persons. The primary question which a justification of intellectual property needs to address, according to Hettinger, is ‘[w]hy should one person have the exclusive right to possess and use something which all people could possess and use concurrently?’¹⁶ He states that the exclusive use of a physical object may be justified where such exclusion is necessary for the person’s own use, but no such justification is available in the context of intellectual property. This nonexclusive feature should be contemplated while discussing the justifications for intellectual property.

¹¹ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 289.

¹² Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 34-35.

¹³ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 34.

¹⁴ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 268-276.

¹⁵ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 34-35.

¹⁶ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 35.

The other problem with justifying intellectual property is created by the fundamental value that society places on freedom of expression and thought. Where private property is granted, one person's freedom is improved to the detriment of all other persons' freedom.¹⁷ Hettinger¹⁸ states that these restrictions on the free flow of information (in the form of intellectual property rights) stifle not only individual growth, but more importantly impede the general advancement of new technologies and knowledge. When these negative consequences of intellectual property are taken into account, it becomes harder to justify intellectual property.

On the other hand, most immaterial property rights are created by statute and as a result they may need additional protection from state interference, as becomes apparent from the analysis in Chapter 2 (Traditional Immaterial Property Interests). According to Dean, intellectual property would no longer exist if these statutes were to be repealed. Parliament would be able to terminate the existence of intellectual property if the statutes creating intellectual property were not entrenched in the Constitution.¹⁹ It is important to note the difference between protection in private law and constitutional law and also the different purposes served by private law protection and constitutional law protection. The purpose of property protection in private law is to get strong property-rule type protection for private rights against competing private parties.²⁰ On the other hand, recognition and protection in constitutional property law has the purpose of acquiring bill of rights type protection for private interests against the state and against competing constitutional rights of other private parties. This is discussed at greater length in Chapter 5 (Immaterial Property Interests in the Constitution).

However, there are also many other forms of property that are created by statute such as sectional title rights,²¹ consequently intellectual property is not unique or special in that regard. The constitutional property clause may provide adequate protection to intellectual property rights, similar to any other category of property. The South African constitutional

¹⁷ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 35.

¹⁸ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 36.

¹⁹ Dean OH 'The case for the recognition of intellectual property in the Bill of Rights' (1997) 60 *THRHR* 105-119 at 113.

²⁰ See Calabresi G & Melamed AD 'Property rules, liability rules, and inalienability: One view of the cathedral' (1972) 85 *Harvard LR* 1089-1128.

²¹ See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 49 for a discussion of real rights created in terms of legislation.

property clause does not only protect property, but provides for expropriation and deprivation by the state, although there are strict requirements that need to be met for such an action to be constitutionally justifiable. This is useful when the interests of an intellectual property owner and other interests such as public interests in the public domain or conflicting private rights such as human dignity, education or freedom of expression need to be weighed up during constitutional interpretation.²²

Hughes states that the biggest difference between rights conferred by intellectual property and the rights conferred by other forms of property lies in the fact that ‘intellectual property always had a self-defined expiration, a built-in sunset’.²³ He argues that this sunset of intellectual property ‘enhances the social *neutrality* of intellectual property rights’.²⁴ He concludes that intellectual property laws in fact fit better under the justificatory theories because of this feature.

Hughes²⁵ refers to Proudhon’s²⁶ proclamation that ‘all Property is theft’ and states that this slogan is incoherent on a literal reading since ‘the idea of theft presupposes that someone else holds legitimate title’.²⁷ He adds that if Proudhon meant to exempt certain property from this accusation, then one is faced with the original dilemma of justifying such an exemption. According to Hughes, property may be justified on either labour or personality theories, but he argues that a combination should be used. He argues that:

‘[p]roperly elaborated, the labor and personality theories together exhaust the set of morally acceptable justifications of intellectual property. In short, intellectual property is either labor or personality, *or* it is theft’.²⁸

Both the labour and personality theory for the justification of intellectual property have received much criticism. These theories and their criticisms, as well as other alternative and supplementary theories are discussed in this chapter.

²² See Chapter 5 (Immaterial Property Interests in the Constitution) for a discussion of constitutional property and expropriation.

²³ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 296.

²⁴ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 296.

²⁵ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 289.

²⁶ Proudhon PJ *What is Property? An Inquiry into the Principles of Right and of Government* (1840, trans Tucker BR 1970) 11-12.

²⁷ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 289-290.

²⁸ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 290.

Ciro states that propertising intellectual creations has been justified on labour, economic and spiritual theories: ‘The philosopher John Locke argued that a labourer has a natural property right to an item that is created with his/her labour.’²⁹ However, he argues that there is no natural right to intellectual property. The second argument is an economic argument that the author of a work needs to be compensated in the form of a property interest in order to provide an incentive to create the work in the first place. This may be split into the reward theory and the incentive theory, respectively. Thirdly, Giro mentions the personality theory as derived from the works of Kant and Hegel, in terms of which ‘an author’s personality, spirit and will cannot be free unless the author owns his/her work’.³⁰ Radin’s³¹ development of the personality theory also needs consideration here.

Ciro³² argues that justifications used for tangible property cannot be used to support the protection of intellectual property. Tangible creations are physically scarce, while intellectual property makes use of information which is a plentiful commodity.³³ Intellectual property is made scarce through artificial constraints imposed by a legal framework, restricting public access to the intellectual work. For these reasons, he argues that an explanation for intellectual property rights should instead be founded on the creation and protection of investor value. This, according to Giro, explains, but does not justify, the enforcement of intellectual property rights in their current form. This argument is one form of economic theory. Another, fairly new theory for the justification of intellectual property is Ghosh’s³⁴ theory of natural monopoly. This theory analyses intellectual property rights from a perspective of natural monopoly, applying criticisms of natural monopoly to the intellectual property system. Finally, one needs to consider the public domain (also known as the commons of intellectual property) in order to conclude a comprehensive discussion of the justifications for intellectual property.

²⁹ Giro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 2.

³⁰ Giro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 2.

³¹ Radin MJ ‘Property and personhood’ (1982) 34 *Stan LR* 957-1015.

³² Giro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 2.

³³ See Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 34-35, where he agrees that there are concerns about applying general property theory to intellectual property. Also see Dean OH ‘The case for the recognition of intellectual property in the Bill of Rights’ (1997) 60 *THRHR* 105-119 where this notion is questioned and Drahos P *A Philosophy of Intellectual Property* (1996) 1. However, compare Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 296 where he concludes that intellectual property actually fits in better with the property theories because it has a built-in expiration or fixed term of property protection.

³⁴ Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U Ill LR* 1125-1183 at 1128.

The purpose of this chapter is to discuss each theory that may justify the legal recognition and protection of immaterial property interests, as well as criticisms levied against it. Furthermore, suggestions are made as to the particular suitability of applying each theory to the traditional³⁵ and unconventional³⁶ forms of immaterial property interests that have been discussed in Chapter 2 (Traditional Immaterial Property Interests) and 3 (Unconventional Immaterial Property Interests). Finally, the impact that each category of immaterial property interests has on the public domain are considered.

4 2 Labour Theory (Natural-Law Theory)

4 2 1 Development in Roman Law and Roman-Dutch Law for Application to Intellectual Property

Mostert³⁷ argues that the natural-law theory is one of the most important theories that support the recognition of intellectual property rights. The theory is derived from the principle that one owns that which one creates by one's own effort and labour: 'The 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.'³⁸ Mostert uses Roman law as a starting point to discuss the development of the natural-law theory for the recognition of intellectual property. He argues that the Roman jurists' treatment of certain natural modes of acquisition of ownership, namely *specificatio*,³⁹ *scriptura*, *pictura* and *occupatio*⁴⁰ show signs of the first emergence of a natural-law theory for the justification of intellectual property. These, according to Mostert, are all forms of *accessio*, which encompassed all instances where a thing belonging to one person was mixed with or united to a thing that belonged to another person, creating one inseparable thing through this act. Although this

³⁵ Traditional immaterial property interests have been defined as patents, copyrights, registered designs and trademarks, respectively. See Chapter 2 (Traditional Immaterial Property Interests).

³⁶ Unconventional immaterial property interests have been defined as commercial information, confidential information, trade secrets, digital copyright, biotechnological products, traditional knowledge, commercial property, participatory claims and non-proprietary rights, respectively. See Chapter 3 (Unconventional Immaterial Property Interests).

³⁷ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property. A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 480.

³⁸ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property. A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 480.

³⁹ *Specificatio* takes place when one person's thing is worked up into another thing by another person who is not the owner of the original thing. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 156.

⁴⁰ *Occupatio* entailed taking occupation of a thing belonging to no one (*res nullius*) in order to acquire ownership. This pertains to a corporeal movable or immovable thing in the sphere of private law (*res in commercio*) which is not owned by anyone. This has to be done with the intention of becoming owner of the thing. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 137.

does not detract from Mostert's argument, it has to be noted that *specificatio*, *scriptura*, *pictura* and *occupatio* are not traditionally regarded as forms of *accessio*. *Accessio* refers to the joinder of two or more separate things in such a way that it forms one entity afterwards. Mostert⁴¹ describes these, traditionally independent, forms of original acquisition (or loss) of ownership as examples of *accessio* to indicate that one owner loses ownership of a thing because another person has 'occupied' it by adding his own work and value to it in such a way that the original loses its independence and hence ceases to exist as a thing.⁴² In some instances, the Roman jurists acknowledged that the labour of one person may have increased the value of the resultant thing to a point where the added value is higher than the original, thereby entitling him to ownership of the new product.⁴³

Mostert⁴⁴ states that the rules for *specificatio* were used in cases where a new thing was created with the materials of another and the acquisition of ownership had to be determined. It had to be determined whether the new thing belonged to the maker by virtue of his labour in its creation (as the Proculians argued) or whether it belonged to the original owner of the materials (as the Sabinians held). Justinian invoked a *media sententia*, deciding that the new thing belonged to the maker only if it could not be restored to its former state. In the case of *accessio*, two or more things belonging to different owners are mixed in such a way that they become one thing and the one thing accedes to the other that is principal. The thing of more value is usually deemed to be the principal thing. This should be distinguished from *specificatio*, where only one thing is changed into another thing by someone who is not the owner of the original thing.

⁴¹ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 SALJ 480-501 at 481-485.

⁴² See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 141-156.

⁴³ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 SALJ 480-501 at 481-485.

⁴⁴ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 SALJ 480-501 at 481-483. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 156-159. Also see Henckert HG *Saakvorming as Wyse van Eiendomsverkryging* (1988); Sohm R *The Institutes: A Textbook of the History and System of Roman Private Law* (1889 trans Ledlie JC 3rd ed 1907) 324; Grotius H *Inleidinge tot de Hollandsche Rechtsgeleerdheid met aantekeninge van SJ Fockema Andraea* (1538-1645 Van Appeldoorn LJ 4th ed 1939) 2 8 2; Van der Keessel DG *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* (1738-1816 Van Warmelo P, Coertze LI & Gonin HL eds 1961-1975) 2 8 2; Van Leeuwen S *Censura Forensis* (1625-1682 De Haas G 1741) 1 2 5 1-1 2 5 2; Voet J *Commentarius ad Pandectas Comitum* (1707 Gane P trans *The Selective Voet* 1955) 41 1 21; *Aldine Timber Co v Hlatwayo* 1932 TPD 337 at 341; *S v Riekert* 1977 (3) SA 181 (T) at 182E-G citing Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 156-159.

Scriptura was the legal concept utilised to determine ownership in instances where someone had written on the parchment or paper of another person. The rules were that the owner of the paper became the owner of the finished product. Mostert argues that the natural-law principle was probably disregarded in the case of *scriptura* due to the relative value of writing.⁴⁵ According to Mostert, the case of *pictura* is seen as the first tentative step towards the recognition of intellectual property.⁴⁶ The rules for *pictura* dictated that if a painter painted a picture on another person's tablet, the picture and the tablet became the property of the painter. Some implicit recognition is as such given to the principle essential to the natural-law principle in the case of *pictura*. This act of creating the painting by the application of intellectual effort cannot merely be recognised by placing a monetary value on the final product.

During the seventeenth-century and later, Roman-Dutch law authors placed more emphasis on the importance of writing and therefore also on the intellectual labour expended to create the work. During this time, the natural-law principle basically became the determining factor for *specificatio*, *scriptura*, *pictura* and *occupatio*.⁴⁷ This express recognition of the natural-law principle, together with the eighteenth century philosophical influences, laid the foundation for the modern recognition of property and intellectual property.⁴⁸

4 2 2 Locke

The natural-law principle as foundation of the recognition of intellectual property played an even more prominent role in the writings of seventeenth century and later legal scholars. John Locke⁴⁹ justified property on the basis that every person has a property in his own person and also his own labour and works created with his labour. The basic idea of Locke's proposition is that by 'mixing' one's labour with land or other tangible property, one acquires a 'natural

⁴⁵ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 483.

⁴⁶ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 484-485.

⁴⁷ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 486-490 and 492.

⁴⁸ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 493.

⁴⁹ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

right' to the property.⁵⁰ This principle that a person should have property in that which he has created by his own intellectual effort and exertion played a large role in the recognition of intellectual property rights.⁵¹ Mostert argues that the doctrine of 'intellectual property' is based on the 'principle that the creator of a work of intellect has an absolute and exclusive right to it, just as property as a tangible thing would grant unfettered dominion to the owner of it'.⁵² The doctrine of 'intellectual property' in this form contributed a great deal towards the recognition of patents and copyright.⁵³ However, there are differing opinions regarding the success of the application of the labour theory to intellectual property.

4 2 3 **The Revised Theory**

Munzer states that 'desert based on labor should play a significant, though by no means the only, role in justifying rights of private property'.⁵⁴ Munzer⁵⁵ distinguishes between the initial and the revised theory based on labour and desert. For purposes of the initial labour theory he defines labour as 'the exertion of effort in order to make or physically appropriate something' and desert as 'worthiness of some recompense because of some personal feature or action'.⁵⁶ He also views the conclusion of the labour-desert argument as the initial labour theory. He outlines the labour-desert theory as follows:

'If the background conditions⁵⁷ exist, then the laborer may use his body to gain control over some thing. If, further, there exist the features of the laboring situation⁵⁸ and the physical and

⁵⁰ See Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 3.

⁵¹ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 494-495.

⁵² Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 495. See Munzer SR *A Theory of Property* (1990) 254-291 where it is argued that the property rights justified by the labour-desert theory should be qualified and restricted in certain instances where it affects the rights of other persons.

⁵³ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 496.

⁵⁴ Munzer SR *A Theory of Property* (1990) 254.

⁵⁵ Munzer SR *A Theory of Property* (1990) 254-291.

⁵⁶ Munzer SR *A Theory of Property* (1990) 256-257.

⁵⁷ Munzer SR *A Theory of Property* (1990) 258: The background conditions assume that there is no society or government, the thing that the labourer hopes to acquire is not owned, there is a sufficient amount of these things with sufficient quality and the labourer has the liberty to use his body for the work required.

⁵⁸ Munzer SR *A Theory of Property* (1990) 258: These features are that the labourer has no moral duty to work, the purpose of working is to acquire enduring control over a thing, the labourer works alone and not for someone, the work done involves physical contact with the thing, the work does not reflect how the labourer sees himself in relation to others and all workers work equally intense and effective.

psychological effects described,⁵⁹ then the laborer is responsible for a product that he does not misuse and over which his enduring control has no adverse impact on others. If, finally, the evaluative and normative features are as specified,⁶⁰ then recognizing his enduring control is the most fitting benefit for his labor and does not infringe the rights of others. Such recognition is the acknowledgement of property rights.⁶¹

According to Munzer, the initial labour theory claims that the labourer deserves property rights in the product created if all the assumptions are true. The labourer would deserve ‘moral property rights in the product in virtue of his labor’.⁶²

Munzer⁶³ notes some problems posed by this approach and suggests the revised labour theory,⁶⁴ because the initial labour theory is based on unrealistic assumptions. He argues that the revised labour theory is the significant point that remains once the assumptions are made more realistic. In the first instance, the labourer’s property rights need to be qualified by broader duties arising from the rights of non-labourers. Such rights would encompass the right to the necessities of life. The assumption that there is no waste is also unrealistic and it is necessary to allow a power of transfer.⁶⁵ In the context of intellectual property and current constitutional thinking, significant examples of these rights of non-labourers could be the right to freedom of speech, education or other political and socio-economic rights.

The second problematic area relates to acquisition. The assumption that property is justified when there are similar things in sufficient quantity and quality left for other people and that they lose nothing by the labourer’s acquisition is not satisfactory. Munzer suggests relying on the principles of utility and efficiency; and justice and equality to constrain the acquisition process. Therefore, limits should not only come from the labour theory itself, but also from outside via an understanding of social complexities.⁶⁶ The problem of scarcity precludes the assumption that the acquisition of a thing changes nothing for other persons. The assumption

⁵⁹ Munzer SR *A Theory of Property* (1990) 258: The physical and psychological effects refers to the fact that the labourer produces a product and not a service, the product is not wasted and others are not adversely affected by the creation or gathering of the product.

⁶⁰ Munzer SR *A Theory of Property* (1990) 258: These features are that the product is good in a general sense, that no one besides the labourer benefits from the product, property rights would not be transferable and would be exclusive, the rights would last indefinitely, the rights would be the most appropriate benefit for the labourer’s work and would not infringe any other persons’ rights.

⁶¹ Munzer SR *A Theory of Property* (1990) 259.

⁶² Munzer SR *A Theory of Property* (1990) 259.

⁶³ Munzer SR *A Theory of Property* (1990) 261-266.

⁶⁴ See Munzer SR *A Theory of Property* (1990) 266-291 for a detailed discussion of this revised labour theory.

⁶⁵ Munzer SR *A Theory of Property* (1990) 267-269.

⁶⁶ Munzer SR *A Theory of Property* (1990) 269-274.

that labour-generated property rights are exclusive and last indefinitely is also unwarranted, since the situation of other persons is changed by the acquisition. According to the alterations made for the revised labour theory, the property rights acquired may be restricted.⁶⁷ In the case of intellectual property, rights are exclusive, but for a limited duration. Furthermore, the rights are not absolute and may be limited when other rights such as socio-economic rights are deemed to be more important than the property rights. Intellectual products are not scarce, in the sense that more can be created.

The last problems relate to transfer, general scarcity and work as a social activity.⁶⁸ Scarcity is not really the problem when it comes to intellectual property, since intellectual property is about creation and it does not ‘use up’ resources in the way that the creation of physical property does. However, information resources may still be taken from the public domain in order to create these intellectual property products and once taken from the public domain and pertained, these resources are no longer available for other persons to use in future intellectual creations; and in this sense scarcity could be perceived as a problem. The revised labour-desert theory holds that labour may still serve as a *prima facie* justification for property rights, but rights qualified by the restrictions discussed.

4 2 4 The Application of the Labour Theory to Immaterial Property

According to Drahos,⁶⁹ there are many interpretations of Locke’s philosophies about property. He states that labour has a relatively small role in the so-called ‘labour theories of property’. According to Drahos,⁷⁰

‘[t]he true value of Locke’s writing on property is that it shows us that the coherence or truth of an argument that relies on natural rights to justify intellectual property rights primarily depends on a concept of community and an accompanying metaphysical scheme. Appeals to labour in labour theories of property are essentially exhortations to keep certain metaphysical assumptions and a concept of community in place’.⁷¹

Drahos⁷² states that the problem that Locke attempted to address by means of his philosophy was that the earth belonged to ‘Mankind in common’, so how could individuals have property in any things? Since natural law proclaimed the existence of a commons, it was problematic

⁶⁷ Munzer SR *A Theory of Property* (1990) 274-276.

⁶⁸ Munzer SR *A Theory of Property* (1990) 276-281.

⁶⁹ Drahos P *A Philosophy of Intellectual Property* (1996) 41.

⁷⁰ Drahos P *A Philosophy of Intellectual Property* (1996) 41.

⁷¹ Drahos P *A Philosophy of Intellectual Property* (1996) 41.

⁷² Drahos P *A Philosophy of Intellectual Property* (1996) 42.

for the same natural law to also explain private ownership. The solution to the problem, according to Locke, was that ‘every Man has a ‘Property’ in his own ‘Person’. Where a person mixes his own labour with something which had previously been in the commons, the thing becomes his property’.⁷³

Locke placed two provisos on the justification of a property right based on labour. The first one is that ‘enough and as good [must be] left in the commons for others’.⁷⁴ This is often interpreted to mean that ‘[a]s long as one does not worsen another’s position by appropriating an object, no objection can be raised to owning that with which one mixes one’s labor’.⁷⁵ Hettinger⁷⁶ argues that patent law does not honour this proviso, since the original inventor is granted the exclusive right to manufacture, utilise and sell the creation. He further points out that independent inventors who come up with the same invention suffer a great loss, since they are not even permitted to use their own invention. Hughes states that the ‘enough and as good as’ condition is usually understood as descriptive of the common. However, he notes that it is ‘also conceptually descriptive of human beings’.⁷⁷ By this he means that there is a natural ceiling on how much each person can appropriate through labour because of the limited capacities of humans.

Locke’s⁷⁸ second proviso to the labour theory pertains to the prevention of spoilage. According to Locke, one must not take more than one is able to use. Hettinger⁷⁹ argues that intellectual property will never be able to meet this proviso entirely, since intellectual property is nonexclusive. He states that the benefit of the products would determine how wasteful it is for the owner of intellectual property to prohibit other persons’ use of the creation. Here it is necessary to qualify that the intellectual property rights granted by statutes does not have the purpose of granting exclusive use rights, but rather the exclusive right to prohibit third persons from doing certain acts with the work. For example, the copyright of a

⁷³ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27. See Drahos P A *Philosophy of Intellectual Property* (1996) 43. Also see Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 297, where he states that Locke’s discussion begins with the description of ‘a state of nature in which goods are held in common through a grant from God ... The individual must convert these goods into private property by exerting labor upon them. This labor adds value to the goods, if in no other way than by allowing them to be enjoyed by a human being’.

⁷⁴ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

⁷⁵ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 44. Also see Drahos P A *Philosophy of Intellectual Property* (1996) 42-43.

⁷⁶ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 44.

⁷⁷ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 297-298.

⁷⁸ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

⁷⁹ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 44-45.

book does not give the exclusive right to read the book. Anyone who is willing to buy the book or prepared to pay a fee to read an electronic copy is allowed to read it. It is only when third persons wish to copy and distribute the book that copyright becomes relevant. Copyright grants the holder the negative right of preventing third persons from copying and distributing the book and taking away the remuneration to which the copyright holder is entitled. In the context of copyright, it is not exclusive personal use and enjoyment of the product that is protected, but rather the right to exploit the product and this kind of use is reserved exclusively for the copyright owner; and these property rights may be justified by the labour theory without contravening the two provisos. This argument is relevant for patents, designs and trademarks as well.

Drahos⁸⁰ asks why labour should serve as the justification for ownership and not, for instance, intention or possession. According to Drahos,⁸¹ Locke's⁸² answer to this question takes on a utilitarian form. Locke suggests that just reward for the industrious is appropriate since an individual's labour has general social benefits. Hughes⁸³ refers to Epstein's⁸⁴ idea that if possession is good enough to establish ownership in one's self, it should also be good enough to possess external things. Epstein argues that the labour theory is used to assist the possession theory, but that the possession of self is the basis for title according to the labour theory. Hughes⁸⁵ does not agree with Epstein's⁸⁶ analysis. Hughes⁸⁷ notes that Locke⁸⁸ never refers to possession of one's body as the basis for property in one's body. Locke simply asserts that one has property in one's body. Hughes also sees Epstein's argument as inaccurate, since 'Locke's overall scheme for property can be viewed as an alloy of the labor and tacit consent theories'.⁸⁹ Locke⁹⁰ implies that the common stock of mankind is increased by granting property to people who created things by their own labour.

⁸⁰ Drahos P A *Philosophy of Intellectual Property* (1996) 43.

⁸¹ Drahos P A *Philosophy of Intellectual Property* (1996) 43-44.

⁸² Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

⁸³ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 298.

⁸⁴ Epstein R 'Possession as the root of title' (1979) 13 *Ga LJ* 1221-1243 at 1227.

⁸⁵ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 298.

⁸⁶ Epstein R 'Possession as the root of title' (1979) 13 *Ga LJ* 1221-1243 at 1227.

⁸⁷ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 298.

⁸⁸ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

⁸⁹ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 298.

⁹⁰ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

According to Hughes⁹¹ there is an obvious problem with this justification. He states that the common stock is not increased as long as the new wealth stays the property of the labourer. Yet if anyone could appropriate the new wealth, there would be no motivation for the labourer to create new wealth that might increase the common stock. One solution, as mentioned by Hughes,⁹² would be to rely on donations made by the labourer to the commons. However, he hastens to add that a better solution would be the one advocated by Locke himself,⁹³ namely to introduce the money economy which would make the new wealth *potentially* part of the commons. Locke assumes three things when introducing the money economy: that the individual is able to appropriate more than can be used; that the individual will have the motivation to do so; and that (with the exception of waste) nothing is wrong with this. Locke finally employs tacit consent as a justification for this money economy.⁹⁴ Hughes⁹⁵ comes to the conclusion that Locke's general system for property may be seen as a combination of labour and tacit consent theories. He notes, however, that it is the labour theory that is considered to be unique to Locke.

Hughes utilises three propositions while justifying property in intellectual creations under Locke's labour theory. These are:

'first, that the production of ideas requires a person's labor; second, that these ideas are appropriated from a "common" which is not significantly devalued by the idea's removal; and third, that ideas can be made property without breaching the non-waste condition'.⁹⁶

He notes that many people accept these propositions implicitly. However, he finds it necessary to test the power of such a justification. First, he looks at the idea that labour is needed for the production of ideas. He discusses the 'avoidance' view of labour, the 'value-added' labour theory and the interaction between labour and the idea/expression dichotomy.⁹⁷

The 'avoidance' view looks at the normative proposition that labour should be rewarded with property, due to its unpleasantness. Hughes⁹⁸ compares this to the instrumental argument that the reward of property should be given to motivate people to perform labour. Hughes also notes that the creation of ideas is not so pleasant an activity that people would choose it

⁹¹ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 299.

⁹² Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 299.

⁹³ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

⁹⁴ See Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 299.

⁹⁵ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 300.

⁹⁶ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 300.

⁹⁷ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 302-314.

⁹⁸ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 302-305.

above recreation, consequently the motivation provided by property rights is also necessary in the production of intellectual products. The so-called ‘value-added’ labour theory is discussed by Hughes⁹⁹ as another interpretation of Locke’s labour justification. This corresponds with the ‘just desert’ justification of property, since it holds that a labourer deserves a reward where something which is of value to others is produced. It is this creation of social value which deserves reward rather than the labour itself. The idea/expression dichotomy pertains to the balancing of the need to reward creators with the need to have free access to ideas.¹⁰⁰

Drahos¹⁰¹ also notes that Locke’s work on property may be interpreted in different ways. Drahos identifies two well-known interpretations, namely those of Tully¹⁰² and Macpherson.¹⁰³ According to Tully’s¹⁰⁴ interpretation, Locke’s¹⁰⁵ philosophy justifies the commons and not the right to private property. However, on Macpherson’s¹⁰⁶ interpretation, Locke provides the foundation for the justification of private property. Drahos¹⁰⁷ notes that Locke’s¹⁰⁸ text encourages interpretations that are in conflict. It is also shown by Drahos that there are two factors that may determine how much weight could be attributed to labour in a theory for the justification of intellectual property. These are ‘a conception of community; and the relation of that community to the intellectual commons.’¹⁰⁹

Hughes¹¹⁰ takes a different approach to the interpretation of Locke’s¹¹¹ theory on property. He agrees that the theory is subject to different interpretations, but he separates these into an instrumental and a normative interpretation. On an instrumental interpretation, the argument would be that society rewards labour with property since rewards *must* be provided in order to get labour. A normative interpretation would say that a reward *should* be given for labour.

⁹⁹ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 305-310.

¹⁰⁰ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 310-314.

¹⁰¹ Drahos P *A Philosophy of Intellectual Property* (1996) 44.

¹⁰² Tully J A *Discourse on Property: John Locke and His Adversaries* (1980) 174-176.

¹⁰³ Macpherson CB *The Political Theory of Possessive Individualism* (1962) 221.

¹⁰⁴ Tully J A *Discourse on Property: John Locke and His Adversaries* (1980) 174-176.

¹⁰⁵ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

¹⁰⁶ Macpherson CB *The Political Theory of Possessive Individualism* (1962) 221.

¹⁰⁷ Drahos P *A Philosophy of Intellectual Property* (1996) 44.

¹⁰⁸ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

¹⁰⁹ Drahos P *A Philosophy of Intellectual Property* (1996) 44. See Sec 4.8 on The Commons for a further discussion of the notion of the intellectual property commons.

¹¹⁰ Hughes J ‘The philosophy of intellectual property’ (1988) 77 *Geo LJ* 287-366 at 296-297.

¹¹¹ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

According to Hughes'¹¹² argument, either of these interpretations may be used to justify intellectual property. He also argues that it may be applied to intellectual property without a number of the problems that tangible property would face in such an application.

As Drahos¹¹³ notes, Locke¹¹⁴ had physical rather than intellectual property in mind when he was writing on property. Nonetheless, his theories about property are widely relied on for the justification of intellectual property. Drahos¹¹⁵ argues that too much emphasis is placed on the labour and mixing metaphor. He states that with physical property the mixing of labour allows persons to appropriate part of the commons for own use. On the other hand, where intellectual property is concerned, this same act of labour may prevent an intellectual property commons from emerging.¹¹⁶

In the 1769 English case of *Millar v Taylor*,¹¹⁷ the court decided that literary property in a published work was recognised by common law. Justification for the recognition and protection of such literary property was found in the natural-law principle that a person should reap the rewards of his own ingenuity and labour. Mostert¹¹⁸ states that the notion that an author's right is founded in natural law forms a strong undercurrent in this decision. By this he means that an author's right is not artificially granted by way of legislation. The legislation is merely supplementary to the natural law right of the author. However, from the history of copyright invention it also becomes apparent that copyright was first lobbied for by booksellers and that authors did not originally benefit from it.¹¹⁹ According to Mostert, modern-day intellectual property still echoes the concept that a person is entitled to that which he has created by his own exertion of intellectual effort.¹²⁰ Mostert further acknowledges that the natural-law theory is not the only theory used in modern-day law to

¹¹² Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 296-297.

¹¹³ Drahos P A *Philosophy of Intellectual Property* (1996) 47.

¹¹⁴ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 27.

¹¹⁵ Drahos P A *Philosophy of Intellectual Property* (1996) 48.

¹¹⁶ See Sec 4.8 (The Commons) of this chapter for further discussion of the intellectual property commons.

¹¹⁷ (1976) 4 Burr 2303, 98 ER 201.

¹¹⁸ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 496-497.

¹¹⁹ See Rose M *Authors and Owners. The Invention of Copyright* (1993) in general.

¹²⁰ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 497.

justify intellectual property, but that the reward and incentive theories also had an influence.¹²¹

Mostert states that ‘the natural law theory, which is justified on the interest of the individual to enjoy the fruits of his own labour, is still of particular prominence in the protection of modern-day intellectual property and especially new forms of intellectual property’.¹²² Hettinger agrees that ‘[p]erhaps the most powerful institution supporting property rights is that people are entitled to the fruits of their labor’.¹²³ He explains the labour theory by stating that the products of a person’s own intelligence, effort and perseverance should belong to that person and to no one else. If the person had not created the object, it would not be there and for that reason the person owns it. This formulation of the labour theory has certain problems. Hettinger¹²⁴ notes that where labour is mixed with something, it may not necessarily be gained. Nozick¹²⁵ gives the example of mixing one’s tomato juice with the ocean and asks whether the tomato juice would be lost or the ocean gained.

According to Hettinger,¹²⁶ a more important problem relates to the question whether a labourer would be entitled to the total value of the resulting product or only to the value that his labour has added to the resulting product. He argues that these two values need to be kept separate. According to Locke,¹²⁷ 99 percent of an object’s value is created by human labour. Hettinger¹²⁸ questions this division of value, stating that 99 percent of an apple’s value is not created by picking it, although some human labour is needed before it has value. The question for intellectual property (patents, copyright and trade secrets)¹²⁹ asks what part of the value of inventions, writings and business information may be attributed to the intellectual labourer. It is clear that without such labour, the creations would not exist, but it

¹²¹ Mostert F ‘The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law’ (1987) 104 *SALJ* 480-501 at 499.

¹²² Mostert F ‘The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law’ (1987) 104 *SALJ* 480-501 at 500.

¹²³ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 36.

¹²⁴ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 37.

¹²⁵ Nozick R *Anarchy, State, and Utopia* (1974) 175.

¹²⁶ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 37.

¹²⁷ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V par 40.

¹²⁸ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 37.

¹²⁹ In the United States of America a trade secret is accepted as a form of intellectual property. In South Africa there has been no clear court case yet as to the position of trade secrets, but there are strong indications that it would be accepted as intellectual property. See Chap 3 (Unconventional Immaterial Property Interests) and Chap 2 (Traditional Immaterial Property Interests).

does not necessarily follow that the whole value of the creation may be attributed to the labourer.¹³⁰

Hettinger¹³¹ describes intellectual products as ‘fundamentally social products’, since creators rely strongly on information that already exists in order to create something new. Firstly he argues that if a labourer should be entitled to the market value of the intellectual product he created, this value should be distributed among all the contributors. There is no logical reason why the last contributor should be entitled to the full value. Accordingly Hettinger is not convinced that the market value could be of assistance in determining the value of a creator’s contribution. Furthermore, he states that the market value is greatly dependent upon different social factors. As a consequence the argument that property rights should be conferred because of own labour would fail.¹³² He reaches the conclusion that it is a myth that a labourer has a natural right to receive the market value of the creation.

Furthermore, Hettinger¹³³ states that another, more plausible interpretation to the natural right theory would be that a moral right to the fruits of one’s labour could refer to the right to use personally and possess one’s own creation. This right would be protected as long as the use does not harm others. Hettinger stresses that the natural right of a creator to utilise his own creation is distinct from the right (protected by intellectual property) to sell copies of the work and to prevent others from making copies of the work. He states that ‘[t]he “right” to receive what the market will bear is a socially created privilege, and not a natural right at all’.¹³⁴

According to Nozick,¹³⁵ the state is an invention, but not individual rights. As such, the main purpose of the state is to protect property rights and should not interfere with them.¹³⁶ Drahos¹³⁷ cautions that this sort of theoretical approach may lead to the conclusion that intellectual property rights should be held in perpetuity. Therefore, in any instances where the

¹³⁰ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 37.

¹³¹ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 38.

¹³² Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 36-37.

¹³³ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 39-40.

¹³⁴ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 39-40.

¹³⁵ Nozick R *Anarchy, State, and Utopia* (1974) 174-178.

¹³⁶ Here it has to be noted that property rights are not the only rights that the state is required to protect. The state also has the obligation to protect socio-economic rights, political rights and other fundamental rights that are as important as or more important than property rights. This entails a balancing of rights. This aspect and other constitutional aspects receive more attention in Chap 5 (Immaterial Property Interests in the Constitution).

¹³⁷ Drahos P A *Philosophy of Intellectual Property* (1996) 53.

duration of intellectual property is limited by way of statute or where compulsory licenses are introduced, this would constitute ‘theft’ of the intellectual property.¹³⁸ This would be a radical implication. Drahos¹³⁹ also notes that one has to keep in mind that the historical tradition of natural property rights does not establish the sanctity of property rights. Property rights remain a phenomenon that is subject to regulation. The government has the power to regulate property, but must do so in line with the purposes of natural law, as Locke¹⁴⁰ states. Drahos¹⁴¹ comes to the conclusion that the writings of Locke cannot serve as a basis for justifying strong intellectual property rights, since the labour mixing metaphor generates too many uncertainties and problems once it is stripped of its metaphysical context. However, it should be possible to justify intellectual property rights that may be balanced with interests of the public in the intellectual property commons or public domain; and also other fundamental rights.

4 2 5 Excludability

For some of the unconventional immaterial property interests, the labour theory does not provide an entirely satisfactory justification. In these cases the notion of excludability may be of more value to determine whether the particular interest may be described as property. According to Gray, the question whether a particular interests may be termed property hinges on whether the interest may be deemed ‘excludable’.¹⁴² ‘The notion of excludability ... imports a hidden structure of rules which critically define the legal phenomenon of private property.’¹⁴³ There are three bases on which a resource may be deemed non-excludable, namely physical, legal and moral. Non-excludable resources lie outside the field of private property, remaining in the commons. Physical non-excludability is described as the situation where ‘it is not possible or reasonably practicable to exclude strangers from access to the benefits of a particular resource in its existing form’.¹⁴⁴ An example of such a situation would

¹³⁸ These situations are foreseen in the constitutional property clause. Statutes such as the ones envisioned by Drahos would be allowed in South African law as long as the state complies with the provisions for deprivation and expropriation as set out in the property clause.

¹³⁹ Drahos P *A Philosophy of Intellectual Property* (1996) 53.

¹⁴⁰ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chapter VIII par 120.

¹⁴¹ Drahos P *A Philosophy of Intellectual Property* (1996) 54.

¹⁴² Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 268-276.

¹⁴³ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 269.

¹⁴⁴ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 269.

be the case of *Victoria Park Racing v Taylor*,¹⁴⁵ where it was not realistic to exclude persons from the spectacle on the property, for purely physical reasons.

‘Ultimately the risk of non-excludable benefit must rest with the plaintiff, and if the plaintiff fails, by such physical means as are at his disposal, to prevent unconsented visual intrusion into his land, the particular resource at stake – the “spectacle” – must be deemed non-excludable. No one can claim “property” in a resource in relation to which it is physically unrealistic to control, consistently over prolonged periods, the access of strangers.’¹⁴⁶

Legal non-excludability is the second form of non-excludable resources that Gray mentions. This refers to situations where legal protection is available for resources, but the owner of the resource failed to use such available means, for example contractual protection or the adoption of a particular regime of intellectual property.¹⁴⁷ The third form of non-excludability refers to morally non-excludable resources.

‘The notion of moral non-excludability derives from the fact that there are certain resources which are simply perceived to be so central or intrinsic to constructive human coexistence that it would be severely anti-social that these resources should be removed from the commons. To propertise resources of such social vitality is *contra bonos mores*: the resources in question are non-excludable because it is widely recognised that undesirable or intolerable consequences would flow from allowing any one person or group of persons to control access to the benefits which they confer. Following such an appropriation, there would not, in Locke’s well known phrase, be “enough and as good left in the common for others” ... It is in the definition of moral non-excludables that the law of property most closely approaches the law of human rights.’¹⁴⁸

The exclusion of certain resources from the property concept on moral grounds recognises that there are certain human rights that are superior to any ‘property’ claims. Certain freedoms of speech, belief, association, assembly and movement are frequently viewed as values higher than the property concept: ‘Here emerges again the important point that property rights are merely *prima facie* rights which may be abridged or overridden by other moral concerns.’¹⁴⁹

¹⁴⁵ (1937) 58 CLR 479. See Chap 3 (Unconventional Immaterial Property Interests) for a brief discussion of the case.

¹⁴⁶ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 270.

¹⁴⁷ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 273.

¹⁴⁸ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 280-281.

¹⁴⁹ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 282-283.

4 2 6 **Conclusions**

The question of which immaterial property interests' protection may be justified on a natural rights or labour theory greatly depends upon the interpretation that one uses. The protection of traditional immaterial property interests, namely patents, copyright, registered designs and trademarks may more easily be justified by utilising the labour theory. Since every form of intellectual creation has some element of labour connected to it, the labour theory still remains one of the strong justifications for intellectual property. However, it may be necessary to employ the personality theory together with the labour theory. In the alternative, the labour theory may be interpreted in such a way that it already incorporates the aspect of personality. Property rights justified in terms of the labour theory are not unlimited. From the construction of the labour theory it becomes apparent that property rights were never meant to be unlimited and unfettered, but meant to consider other rights and interests. Gray's¹⁵⁰ analysis of excludability indicates that this is a particularly important consideration for immaterial property interests and the question whether they may qualify as property. In the case of traditional immaterial property interests or intellectual property (patents, copyright, designs and trademarks) each category is created by legislation. As long as the creator of the intellectual work invokes the protection afforded by this legislation, the work will be legally excludable and as such enjoy property protection, subject to limitations. Some aspects will also not be protected as property, but remain in the public domain or commons if it is deemed to be morally non-excludable. Examples of this would be materials that are excluded from patentability.

The protection of unconventional immaterial property interests, namely commercial information, confidential information, trade secrets, digital copyright, biotechnological products, traditional knowledge, commercial property, participatory claims and non-proprietary rights are more problematic to justify in terms of the labour theory. It is apparent that some labour was expended in creating commercial information and therefore the labour theory may be used to justify property in the resource. However, this is subject to the principles of excludability. In some instances it may be physically impossible to exclude persons from accessing commercial information or there could be no legal way to exclude persons. Furthermore, it is possible that legal exclusion was possible, but not invoked by the creator of the information.

¹⁵⁰ Gray K 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307 at 268-276.

Confidential information also involves an element of labour and as such the labour theory is suitable to justify protection of this interest. However, there is currently no legal recourse for creators who wish to protect these property interests from third persons, with the exception of protection for trade secrets which is a *species* of commercial information. Trade secrets may be protected as a legally excludable resource as long as the requirements for the protection a trade secret have been met. Digital copyright is merely a problematic aspect of copyright and should consequently be treated no different than ordinary forms of copyright. The problematic aspect of digital copyright is that copyright protection is not viewed as adequate in the online world and therefore recourse is taken to the law of contract for additional protection. Therefore the resource would still be viewed as legally excludable, since the non-excludability problem created for copyright online is solved by contractual protection.

The creation of biotechnological products also involves labour and may be justified by the labour theory. However, this may be an instance where the concept of moral non-excludability could be particularly useful. Although some biotechnological products are legally excludable since they are protected under patent law, some forms of biotechnological products are not patentable; and this may be attributed to the fact that they are morally non-excludable by reason of the fact that the information should remain in the commons or for reasons pertaining to the rights of other people such as privacy and bodily integrity.

Traditional knowledge is a particularly troublesome form of unconventional immaterial property, since only the last person who contributed to the intellectual creation is rewarded. For example, where a pharmaceutical company patents a medicine utilising traditional knowledge to find a particularly valuable medicinal plant, only the company is rewarded with a patent. Generally, the traditional community who held the knowledge is not rewarded. Although there is a movement to include traditional knowledge under the existing forms of intellectual property in order to reward the holders of traditional knowledge, the property theories provide weak justification for the protection of traditional knowledge. It is submitted that justification could possibly rather be found in theories of distributive justice or human rights. However, the focus of this chapter falls only on property theories and their merits and shortcomings.

The protection of commercial information hinges on whether the resource may be viewed as excludable rather than whether any labour has been expended to create the particular resource. The labour theory is not really useful to justify property rights in commercial property interests. Participatory claims could possibly be justified by the labour theory; since some form of own contribution is required before a participatory claim would be recognised as property. Non-proprietary rights are not really justified by the labour theory either, since the labour theory has ownership as its object, while non-proprietary rights concern rights other than ownership. As long as some labour was involved in the creation of the intellectual resource, property in such a creation may be justified by using the labour theory. However, the labour theory is not particularly helpful in determining who should be rewarded and how much the reward should be for the labour expended.

4 3 Reward Theory

4 3 1 The Reward Theory

According to Mostert,¹⁵¹ the reward theory is similar to the natural-law theory. The reward theory entails that an individual should be rewarded for his own labour and effort, but it also takes into account the benefit to society in general that flows from the individual's effort. The reward theory is hence based on the principle that an individual should be rewarded for his creative efforts that benefit society.¹⁵² The creative individual is awarded an exclusive intellectual property right as a reward for his creative endeavours (for example a patent, copyright, trademark or design). In the case of intellectual property rights, the resources are legally excludable because legislation creates the opportunity for the creators of intellectual products to invoke protection for these products. This is qualified by moral non-excludability, but this is largely provided for in the legislation. For example, there is no copyright in ideas since this should stay in the public domain for future utilisation. At least some unconventional immaterial property interests are not legally excludable, so more attention needs to be spent determining whether these interests are physically or legally excludable and also whether there are concerns causing it to be morally non-excludable.¹⁵³

¹⁵¹ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 500.

¹⁵² Also see Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366.

¹⁵³ See Gray K 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307 at 268-276 where he develops the three forms of non-excludability; namely physical, legal and moral non-excludability.

4 3 2 Views Regarding the Applicability of the Reward Theory to Immaterial Property

Hettinger¹⁵⁴ endorses the idea that society rewards inventors and writers in the form of a legal right to exclude other persons from certain forms of use of the work. This is received in return for making the works publicly available. He states that in such instances where intellectual property brings about the disclosure of works that would otherwise have remained secret, intellectual property (specifically patents, designs and copyright) will enhance the free flow of information instead of restricting it. However, he notes that this is not the case with trade secrets. Instead of promoting the dissemination of information, the requirements for a trade secret promote secrecy. One of the main requirements for holding a trade secret is that the information must not be widely known. It becomes clear on Hettinger's interpretation that the reward theory may be used to justify patents, designs and copyright, but is not an appropriate justification for the protection of trade secrets.

Hettinger¹⁵⁵ describes another variation of the reward theory, namely the desert theory. This theory fundamentally suggests that a labourer deserves to benefit from his labour. Although a convincing argument, the problem with this theory is that it does not indicate what the labourer would be entitled to. Hettinger notes that a property right is not the only possible reward. There is also the possibility of 'fees, awards, acknowledgement, gratitude, praise, security, power, status and publicly financed support'.¹⁵⁶ A property right may not be the most fitting reward in instances where the value of the right is disproportionate to the effort the labourer spent. According to Hettinger¹⁵⁷ it would be incorrect to say that one deserves the amount proportional to the value that the labour produces. Often the value of the creation is affected by outside factors and one does not deserve to be rewarded if one is merely lucky.

Rawls¹⁵⁸ argues that even the capability to expend effort is a factor outside of a person's control. Consequently he considers it a morally impermissible criterion to determine distribution. Hettinger¹⁵⁹ states that the proportionality requirement may also be violated by the granting of a property right. For example, the copyright in a computer program might

¹⁵⁴ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 36.

¹⁵⁵ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 41.

¹⁵⁶ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 41.

¹⁵⁷ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 42.

¹⁵⁸ Rawls J A *Theory of Justice* (1971) 104.

¹⁵⁹ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 43.

earn the owner much more than the initial expenditure of creating it. Hettinger¹⁶⁰ argues that copyright as well as a trade secret confer more benefits than what is fair according to the initial cost of creation.

Munzer¹⁶¹ discusses the labour and desert theories in combination, under what he calls the ‘labor-desert’ theory. He discusses the initial theory, which concludes that ‘a *prima facie* justification exists for a set of private-property rights in a version of the state of nature’ whereas the revised theory concludes that ‘a *prima facie* justification exists for a somewhat different set of private-property rights in a modern society’.¹⁶² Munzer¹⁶³ argues that desert still plays a role in the revised labour-desert theory, even though it is supplemented and occasionally trumped by the roles of utility and efficiency; and justice and equality. With the revised theory, property rights are not product tied and as far as wages are concerned, there exist no precise correlations for desert claims.

Munzer states that ‘although commensurateness is a problem, comparative assessments of desert claims based on labor are feasible. The tasks are to identify relevant features of a worker’s performance and to arrive at a fitting recompense.’¹⁶⁴ The revised theory places some weight on ‘the relative importance of effort, ability, persistence, industriousness, luck, time spent, achievement, the difficulty, unpleasantness, or danger of the work, and the working conditions’.¹⁶⁵ The revised theory also emphasises the social nature of work, taking into account factors such as ‘the responsibility, leadership, or motivating capacity displayed by one worker in relation to others’.¹⁶⁶ By use of these factors, the case of one worker or type of job may be compared to other workers or jobs and by doing so attempt to ‘arrive at some relative fitting recompense for each. This procedure does not generate absolute values, disclose the “inherent worth” of labor, or yield a “just price” for labor’.¹⁶⁷

¹⁶⁰ Hettinger EC ‘Justifying intellectual property’ (1989) 18 *Phil & Pub Affairs* 31-52 at 43.

¹⁶¹ Munzer SR A *Theory of Property* (1990) 254-291.

¹⁶² Munzer SR A *Theory of Property* (1990) 255.

¹⁶³ Munzer SR A *Theory of Property* (1990) 289-291.

¹⁶⁴ Munzer SR A *Theory of Property* (1990) 290.

¹⁶⁵ Munzer SR A *Theory of Property* (1990) 290.

¹⁶⁶ Munzer SR A *Theory of Property* (1990) 290.

¹⁶⁷ Munzer SR A *Theory of Property* (1990) 290.

4 3 3 Conclusions

In summary, in the case where the granting of an intellectual property right promotes dissemination of information, the reward theory may be used. The protection of patents, copyright and registered designs may be justified on the reward theory. In the case of trademarks, it does not seem as if any benefit is created for society in general except perhaps the relatively minor benefit of not confusing the trademarked product with other possibly inferior products. Therefore the reward theory may not be the best theory to justify protection of trademarks. In other words, with the exception of trademarks, it is possible to justify the traditional immaterial property interests on the basis of the reward theory. However, the theory may only serve to justify a reward, but does not give any indication as to what the reward should be and as such it does not necessarily have to take the form of a property right.

The protection of all the unconventional immaterial property interests is not clearly justified by the reward theory. Commercial information encompasses some form of benefit for the persons who are willing to pay for the information, so the reward theory is somewhat successful for the justification of commercial information protection. However, the excludability issue is also of particular importance for this category of unconventional immaterial property interests. In the case of trade secrets and confidential information, the information is not made known; accordingly the reward theory has no applicability. Digital copyright may be protected under copyright and its protection may be justified by the reward theory on the same grounds. This should be the case even though digital copyright is protected by contract in addition to the copyright protection afforded by copyright law. Biotechnological products that are not liable to remain in the public domain on conceptual grounds may be protected under patent law and as such these rights may also be justified by the reward theory.

In the case of traditional knowledge, the traditional community receives no reward for making their information known. For example, the person who registers the patent based on traditional knowledge receives the full reward. Munzer and Raustiala¹⁶⁸ state that one cannot ‘rule out desert based claims to TK [traditional knowledge] by an indigenous people on conceptual grounds. But if a labor-desert principle is pressed into service for TK, its justificatory force is distinctly limited. Perhaps the originators, or the group of originators, of

¹⁶⁸ Munzer SR & Raustiala K ‘The uneasy case for intellectual property rights in traditional knowledge’ (2009) 27 *Cardozo Arts & Ent LJ* 37-97 at 59-60.

the TK deserve rights in it, but they are long dead. It is hard to see why their remote descendants should deserve an IP [intellectual property] right in TK that they did not originate.¹⁶⁹

Accordingly, the reward theory is not a strong justification for the protection of traditional knowledge, but may play a role albeit not the most important role.

4 4 Incentive Theory

4 4 1 The Incentive Theory

Mostert¹⁷⁰ states that the incentive theory takes the importance of society's interest in intellectual works one step further. The incentive theory is based on the premise that 'if an individual's intellectual creation is protected by law, this will serve as an incentive for other creative individuals to produce intellectual works from which society will benefit.'¹⁷¹ Hettinger argues that this utilitarian argument based on incentives is the strongest and most widely utilised justification for patents, copyrights and trade secrets. He explains the incentive theory as follows:

'According to this argument, promoting the creation of valuable intellectual works requires that intellectual labourers be granted property rights in those works. Without the copyright, patent, and trade secret property protections, adequate incentives for the creation of a socially optimal output of intellectual products would not exist.'¹⁷²

The United States Constitution has specifically taken up the incentive theory in the context of patents and copyright and the so-called Intellectual Property Clause¹⁷³ provides that intellectual property rights are granted 'to promote the progress of science and the useful arts',¹⁷⁴ which is incentive-based.

¹⁶⁹ Munzer SR & Raustiala K 'The uneasy case for intellectual property rights in traditional knowledge' (2009) 27 *Cardozo Arts & Ent LJ* 37-97 at 59.

¹⁷⁰ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 500.

¹⁷¹ Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property - A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 500.

¹⁷² Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 47.

¹⁷³ The Constitution of the United States of America Article I Section 8 Clause 8.

¹⁷⁴ The Constitution of the United States of America Article I Section 8 Clause 8.

4 4 2 Opinions on the Applicability of the Incentive Theory to Immaterial Property

This incentive-based theory focuses on the users of immaterial property and particularly intellectual property; and uses the grant of property rights to creators merely as a tool to ensure further production of intellectual creations. Hettinger¹⁷⁵ notes that this approach is not without paradox. An intellectual property right is granted in order to ensure future intellectual products, yet the right restricts the use and availability of current intellectual creations. Hettinger¹⁷⁶ suggests that it might be more rational to provide a different yet equally powerful incentive that does not restrict the use and availability of intellectual creations. One of the possible alternatives that he suggests is government support for intellectual creation and its public ownership. According to Hettinger,¹⁷⁷ the crucial question in this context is to what extent intellectual property increases or restricts the availability of intellectual creation, and which is greater. He asks whether the goal could be better attained by shortening the term of patents and copyright and possibly eliminating the category of trade secrets in its entirety. The incentive provided by a patent is increasingly being used as a tool for monopoly, as Hettinger¹⁷⁸ argues. Trade secrets may similarly act as a suppressor of competition. He concludes that it has not been proven conclusively that the incentive theory justifies the institution of intellectual property.

Ghosh notes that '[t]he language of incentives pervades intellectual property law'.¹⁷⁹ In some instances courts as well as commentators see the intellectual property grant as a reward for making one's creative works public. Yet others describe it as a *quid pro quo* and as such an exclusive right is awarded in exchange for making new works available to the public. According to Ghosh, even natural rights theories found the rights granted in need of legal protection in order to encourage creative activities. However, Ghosh¹⁸⁰ states that there are big problems in justifying intellectual property by means of incentive talk. The obvious problem that creation occurs even without the incentive of an intellectual property grant is seen as uninteresting by Ghosh. According to him, the more problematic aspect is that the

¹⁷⁵ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 48.

¹⁷⁶ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 48-49.

¹⁷⁷ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 49.

¹⁷⁸ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 50.

¹⁷⁹ Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U Ill LR* 1125-1183 at 1130.

¹⁸⁰ Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U Ill LR* 1125-1183 at 1131. Also see Ghosh S 'The intellectual property incentive: Not so natural as to warrant strong exclusivity' (2006) 3 *SCRIPT-ed* 97-108 at 97-98.

incentive theory predicts little about the structure of intellectual property, only that it should be as strong as possible in order to create the maximum incentive. There are some limits on rights in order to protect cumulative invention, but Ghosh states that these were introduced as an afterthought and as exceptions to the rule that intellectual property rights should be as strong as possible.

Another error in the incentive story, as Ghosh¹⁸¹ notes, lies in the premise that intellectual property protection is necessary to correct market failures which arise from the high fixed costs of creating and the low marginal cost of distributing the creation. Ghosh argues that the error is made when justifying intellectual property rights in terms of the prevention of free riding. Similarly, when intellectual property is limited in order to give the owner enough of an incentive to create the work, this mistake is made. In both of these scenarios, the costs incurred in creating the work are used to determine intellectual property rights. The problem lies in the fact that the cost structure gives little details of how intellectual property systems should be structured and how policies should be implemented. This approach overemphasises the concern of cost and neglects the role of allocation and utilisation.¹⁸² Instead of this approach, Ghosh suggests a ‘re-regulation’ of intellectual property.¹⁸³

4 4 3 Conclusions

The incentive theory points out the difficulties one faces in attempting to find a balance between a sufficient amount of incentive and relatively free access to information. Where traditional immaterial property, namely patents, copyrights and registered designs are concerned, it is fairly plain that an incentive may be necessary for the creation of such useful intellectual works. However, it is uncertain whether the granting of intellectual property rights does fulfil an incentive function or whether the informational products would have been created regardless. With trademarks, again, there is no visible value for society. The creation of trademarks does not seem to need any incentive via intellectual property rights, since the incentive behind trademarks is probably to sell products or services.

¹⁸¹ Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U III LR* 1125-1183 at 1131.

¹⁸² Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U III LR* 1125-1183 at 1132.

¹⁸³ Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U III LR* 1125-1183 at 1128. See Sec 4.7 (The Theory of Natural Monopoly) of this chapter for an explanation.

Similar to the reward theory, the incentive theory is more problematic to apply to the unconventional immaterial property interests than the traditional immaterial property interests. Regarding the category of commercial information, there may be some function of incentive, since people would be less inclined to compile information if their work may be freely appropriated. Here excludability¹⁸⁴ is once again of importance. If there is legal protection available to the creator of the information and it is not utilised, then the resource is non-excludable. In the case of confidential information and trade secrets, there is no benefit to the community since no information is made public. It would not be useful to incentivise the production of products that has no utility for the benefit of society at large. The crux as to whether this theory is useful to justify a particular immaterial property interest hinges on its use to society and whether information is being made public or not.

Digital copyright and biotechnological products may once again be treated as categories of intellectual property, under copyright and patents respectively. These products are valuable to society and some form of incentive is necessary to ensure their continued production. Once again biotechnological products would only be included under this category if they are not excluded from protection in terms of the exclusions in patent law or in light of public interests such as the public domain or a private interest such as the right to privacy, freedom of expression or bodily integrity.

The same concern as with the reward theory is relevant in the case of traditional knowledge. Munzer and Raustiala note that

‘indigenous people did not need incentives in the form of modern IP rights to develop TK. From time immemorial groups of all kinds developed specialized knowledge and folklore. So the primary point of legal protection of TK now for indigenous peoples is to keep others from purloining their handiwork, which by definition is of long-standing.’¹⁸⁵

They suggest that indigenous groups seek to control their cultural products and consequently their identity and that this may be achieved by granting the following protections to indigenous groups:

‘a claim right to its TK; a power to create rules that bind others in regard to the copying or reverse-engineering of its TK; a claim-right to receive just compensation for granting access to its TK; a power to seek and a claim-right to have a wide range of remedies for others’

¹⁸⁴ Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307.

¹⁸⁵ Munzer SR & Raustiala K ‘The uneasy case for intellectual property rights in traditional knowledge’ (2009) 27 *Cardozo Arts & Ent LJ* 37-97 at 73.

failure to pay compensation or obtain informed consent; and lastly powers to modify otherwise applicable laws of patent and copyright'.¹⁸⁶

The incentive theory is even less applicable for the justification of traditional knowledge protection than the reward theory.

4.5 Spiritual Theories

A personality theory has been derived from the writings of Kant¹⁸⁷ and Hegel,¹⁸⁸ namely that an author's personality, spirit and will cannot be free unless the author is also the owner of the work created. According to the theory, once a property right is granted, the author's will is unrestricted because he/she fully controls their spirit and personality. As a result a property right in a creation must be granted before a creator can be fully in control of their spirit and personality.¹⁸⁹ According to Drahos, the purpose of Hegel's¹⁹⁰ writings is 'to reveal the role and effects that community play in the evolution of individual freedom'.¹⁹¹ Drahos examines 'Hegel's'¹⁹² explanation of the role of property in those systems that he identifies as being active in the development of the individual will and the state.¹⁹³ Drahos¹⁹⁴ asks whether Hegel's analysis of property as a phenomenon of system offers any insights into the phenomenon of intellectual property. According to Drahos'¹⁹⁵ interpretation of Hegel's writings on property, intellectual property may have negative effects on community.

Drahos¹⁹⁶ notes that Hegel's arguments concerning property are not widely followed in legal philosophy. One interpretation of Hegel's writings suggest that a distinctive personality theory of property may be derived, which may be contrasted with Locke's labour theory of property. Drahos¹⁹⁷ argues that it would be possible to make the link between property rights and personality in the case of copyright, which encompasses literary, artistic and dramatic works. In such instances the link between personality and ownership of the creative work looks strong. Drahos cautions against the strategy of using Hegel's personality theory to

¹⁸⁶ Munzer SR & Raustiala K 'The uneasy case for intellectual property rights in traditional knowledge' (2009) 27 *Cardozo Arts & Ent LJ* 37-97 at 73.

¹⁸⁷ Kant I *Critique of Practical Reason and Other Works on the Theory of Ethics* (1788, trans Abbott TK 1898).

¹⁸⁸ Hegel GWF *Philosophy of Right* (1821 trans Knox TM 1952) par 41-71.

¹⁸⁹ See Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 4.

¹⁹⁰ Hegel GWF *Philosophy of Right* (1821 trans Knox TM 1952) par 10.

¹⁹¹ Drahos P A *Philosophy of Intellectual Property* (1996) 73.

¹⁹² Hegel GWF *Philosophy of Right* (1821 trans Knox TM 1952) par 10.

¹⁹³ Drahos P A *Philosophy of Intellectual Property* (1996) 73.

¹⁹⁴ Drahos P A *Philosophy of Intellectual Property* (1996) 73.

¹⁹⁵ Drahos P A *Philosophy of Intellectual Property* (1996) 74.

¹⁹⁶ Drahos P A *Philosophy of Intellectual Property* (1996) 74.

¹⁹⁷ Drahos P A *Philosophy of Intellectual Property* (1996) 74-75.

justify (at least) those intellectual property rights that involve the personality creatively. He offers two distinct reasons why such an approach would not be workable. In the first instance, he questions whether the property theories of Locke and Hegel should be contrasted by reference to labour and personality. On Drahos'¹⁹⁸ interpretation, Locke¹⁹⁹ sees property as serving the personality, while Hegel views property as the '*embodiment* of personality'.²⁰⁰ The second reason Drahos²⁰¹ offers, is that an aspect of Hegel's writings that is often overlooked is that Hegel saw a contradiction in individual property ownership.

Hettinger²⁰² argues that '[p]rivate property can be justified as a means to sovereignty'. By this he means that in order to achieve individual autonomy, a person must have dominion over certain objects. However, copyrights and patents are not important or necessary to achieve these goals. Here a creator's right to use his invention must once again be distinguished from the right to prevent others from using the invention. If a person were prevented from using his own invention, this would certainly threaten his sovereignty, but the right to exclude others would not affect such sovereignty.

According to Hughes,²⁰³ the most powerful alternative to a labour theory for the justification of intellectual property would be a personality justification. Such a justification holds that 'property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person'. Radin²⁰⁴ describes the 'personhood perspective' by saying a person has to have control over certain resources in the external environment in order to be a person. This control, she argues, needs to be fulfilled by property rights. Whether an intellectual property interest may be justified by the personality theory or not, depends on how central an interest is to the fulfilment of one's personhood. The personhood perspective that Radin²⁰⁵ describes starts from the premise that certain items of property are closer to personhood, for example a wedding ring or a house. A wedding ring at a jeweller's shop would be replaceable, while the ring would not be replaceable if it were lost by a person who wears the wedding ring. Radin²⁰⁶ distinguishes

¹⁹⁸ Drahos P *A Philosophy of Intellectual Property* (1996) 75.

¹⁹⁹ Locke J *Second Treatise of Government* (1690 Gough GW (ed) 1976) Chap V.

²⁰⁰ Hegel GWF *Philosophy of Right* (1821 trans Knox TM 1952) par 51.

²⁰¹ Drahos P *A Philosophy of Intellectual Property* (1996) 75.

²⁰² Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 45.

²⁰³ Hughes J 'The philosophy of intellectual property' (1988) 77 *Geo LJ* 287-366 at 330.

²⁰⁴ Radin MJ 'Property and personhood' (1982) 34 *Stan LR* 957-1015.

²⁰⁵ Radin MJ 'Property and personhood' (1982) 34 *Stan LR* 957-1015 at 959-960.

²⁰⁶ Radin MJ 'Property and personhood' (1982) 34 *Stan LR* 957-1015 at 960.

between the two scenarios by referring to the one as fungible property and the other as personal property. She claims that there would be a stronger moral claim for the protection of property for personhood than fungible property.²⁰⁷

The basic premise is that some forms of property are more worthy of protection than others and should consequently enjoy more stringent legal protection. Radin²⁰⁸ creates the picture of a continuum with personal property on the one end and fungible property at the other end. Property closer to the 'fungible' end could more easily be overridden than property at the personal side which has a stronger entitlement, even though such a split between the two forms of property would not work in all situations. Radin²⁰⁹ uses the example of a home since this is closely connected with liberty, privacy and freedom of association. Furthermore she identifies the area of 'takings'²¹⁰ as a difficult area yet one where the personality theory could be applied successfully. Courts are more likely to award compensation for property that has a personal aspect than for the taking of property that constitutes merely monetary loss. Finally, Radin²¹¹ explores the interaction between fungible property and interests other than property interests such as freedom of expression, concluding that such interests could override an interest in fungible property more easily than if the property interest were personal. If both interests have a personal aspect, then it is more difficult to weigh up the interests.

Therefore, in the constitutional context, one would have to examine the specific type of property to determine whether it has an element of personality. If not, then another constitutional right such as the right to education or freedom of expression would more easily outweigh the property interest. If it does have a personal aspect, such as is perhaps the case with copyright, then a court would have to weigh up the two more equal rights to determine which one should ultimately be protected more stringently than the other.

The protection of intellectual property categories, namely patents, copyright, designs and trademarks, may be justified by the spiritual theories insofar as they serve to secure a sphere of personal liberty. These theories are viewed as one of the strongest justifications for the protection of intellectual property. Copyright appears to be the only category which is closely

²⁰⁷ Radin MJ 'Property and personhood'(1982) 34 *Stan LR* 957-1015 at 978.

²⁰⁸ Radin MJ 'Property and personhood'(1982) 34 *Stan LR* 957-1015 at 986-987.

²⁰⁹ Radin MJ 'Property and personhood'(1982) 34 *Stan LR* 957-1015 at 991-1002.

²¹⁰ Radin MJ 'Property and personhood'(1982) 34 *Stan LR* 957-1015 at 1002-1008.

²¹¹ Radin MJ 'Property and personhood'(1982) 34 *Stan LR* 957-1015 at 1008-1013.

linked to the personality, as envisioned by Radin's personality theory. Once again, these theories are not that easy to apply to the unconventional immaterial property interests. Digital copyright and biotechnological products may be justified by the spiritual theories, similar to the categories of copyright and patents. The protection of commercial information, confidential information and trade secrets cannot be justified by the spiritual theories since they are not instrumental in achieving individual autonomy. There is no need to consider commercial property, participatory claims or non-proprietary rights in terms of the spiritual theories. Traditional knowledge protection could possibly be justified by the personality theory since the knowledge is so closely connected to the cultural and spiritual life of the holders of the traditional knowledge. This theory could at least be a point of departure for developing a theory on why traditional knowledge should enjoy any form of property protection.

4 6 Economic Theory

Another justification for awarding property rights in intellectual creation is a theory founded on economic grounds. Drahos²¹² states that intellectual property rights are very closely related to markets. Intellectual property rights are the mechanisms by which markets in information are created. He also notes that economic theory is an important resource in justifying intellectual property, but has a very wide scope and is diverse in approaches. In the case of intellectual property, a market failure arises due to the high initial cost of creation and marginal distribution costs of intellectual products. The basic economic theory for intellectual property entails that an economic incentive to create is provided in order to overcome market failure.

Ciro²¹³ states that the argument is self-fulfilling. In order to provide the incentive to create, the author of a work must be compensated by awarding him a property right. Ciro criticises this theory, arguing that there is no proof that only property rights can provide this incentive. He states that intellectual works are created even in the absence of property rights and that the creators are often not the owners of the property rights. Furthermore, even if an incentive is provided, it is uncertain how much compensation is required in order to ensure an incentive. In the United States, there have been attempts to extend the copyright term to life of the

²¹² Drahos P *A Philosophy of Intellectual Property* (1996) 6.

²¹³ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 4.

author plus 120 years in an attempt to cover the expiration of copyright on the Disney collection.²¹⁴

In respect of resource allocation, property laws are applied most comfortably in the context of tangible property because of its physical scarcity. Ciro²¹⁵ states that the interaction between law and economics is embodied in the system of private property. Property laws are essentially used for the allocation of scarce resources among competing needs. The economic argument would be that suppliers would refrain from producing and supplying to the market if there were no specific property protection, even with potentially high prices and profits. The argument is based on the free rider principle that opportunists should not be allowed to reap where they have not sown. According to this argument, there would be no incentive to invest skill and resources to create if the free rider was allowed *carte blanche*. Ciro²¹⁶ makes the argument in support of free riders, namely that they provide much needed competition, in *lieu* of which the marketplace would be firmly in the grip of a monopolist. According to Ciro, this is also the reason why the state imposes limitations on the duration of intellectual property monopolies and allows limited public access to the works.

Ciro²¹⁷ points out that unlike tangible property, intellectual property is not inherently scarce, so the market failure justification cannot be utilised to support intellectual property arguments. In the case of intellectual creation, their scarcity is created by way of legislation protecting intellectual creation as property. Market value of intellectual creations is not only dependent upon market demand, but also artificial scarcity imposed by property legislation. The reason why economists view the property system as the only viable option for the protection of intellectual property involves a market instrumental justification, according to Ciro.²¹⁸ This justification holds that it is costly to produce intellectual creations and if property is not granted in return, some of the creations may not be produced. This argument is a self-fulfilling prophecy. As Ciro states:

²¹⁴ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 4.

²¹⁵ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 5-7.

²¹⁶ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 5. Compare Boyle J 'Symposium: Taking stock: The law and economics of intellectual property rights: Cruel, mean, or lavish? Economic analysis, price discrimination and digital intellectual property' (2000) 53 *Vand LR* 2007-2039.

²¹⁷ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 5.

²¹⁸ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 5.

‘Intellectual property laws produce an artificial restriction that creates the scarcity problem and are then used to allocate scarce resources through a complex web of private property rights controlled by intellectual property owners.’²¹⁹

Boyle explains the basic economic theory as applied to intellectual property as follows:

‘Information is a public good, non-excludable and non-rival. It is hard to stop one unit from satisfying an infinite number of users at zero or close to zero marginal cost. Under such conditions, producers of information and information goods will have inadequate incentives, leading to under-production. If I could create a useful digital restaurant guide at great expense but can sell only one copy before my whole market disappears, then I will hardly make the effort in the first place. The solution to this public goods problem is intellectual property. By creating a limited monopoly called an intellectual property right, we can give producers an adequate incentive to create.’²²⁰

He states that this argument has been used to expand the reach of intellectual property. Especially in the area of the internet it is argued that the goods become even less rivalrous and less excludable and for this reason intellectual property protection should be stronger. However, he hastens to add that the argument is not as straightforward as it looks, either at a theoretical or an empirical level, since an intellectual property right entails a monopoly. In economic terms, monopolies are usually seen as imposing losses. This might lead to the expectancy that the benefits of encouraging innovation would be at least offset by costs of the monopoly: ‘It seems to suggest that the idea of a perfect market in information is internally contradictory even in theory.’²²¹

As Ciro²²² also notes, a similarly convincing market based argument may be made against granting property rights in intellectual creation. By granting intellectual property rights, monopoly rights are in actual fact being awarded and this may be seen as anti-competitive. Ciro argues that it is market value rather than market failure that may be used to explain the creation and protection of intellectual property. This is reflected in the way multinational corporations seek extensions for the duration of copyright on their intellectual property. This

²¹⁹ Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 6.

²²⁰ Boyle J ‘Symposium: Taking stock: The law and economics of intellectual property rights: Cruel, mean, or lavish? Economic analysis, price discrimination and digital intellectual property’ (2000) 53 *Vand LR* 2007-2039 at 2012.

²²¹ Boyle J ‘Symposium: Taking stock: The law and economics of intellectual property rights: Cruel, mean, or lavish? Economic analysis, price discrimination and digital intellectual property’ (2000) 53 *Vand LR* 2007-2039 at 2012-2013.

²²² Ciro T ‘The scarcity of intellectual property’ (2005) 1 *JILT* 1-21 at 6.

is motivated purely by financial reasons. Monopolists are merely eager to maintain exclusive control over their streams of revenue.²²³

It becomes apparent that different versions of an economic theory may be utilised. The most basic version of the economic theory is that a person would not be motivated to expend their revenue and time if there were not some reward in the form of a property right. This theory still leaves open the question of how much the reward should be. Since basically all forms of immaterial property are created by means of some form of financial investment, this theory may be applied to the traditional as well as some of the unconventional immaterial property interests. The intellectual property categories of patents, copyright, designs and trademarks have high initial costs, but afterwards the products may be produced and distributed at very low cost. Without some form of protection, creators and investors would not be willing to spend money and effort on creating new intellectual products. Consequently the economic theory does convince in the area of intellectual property, although it is not established that a property right is necessarily the only way to provide compensation or incentive.

The protection of digital copyright and biotechnological products may be justified by the economic theory, similar to copyright and patents. Commercial information, confidential information and trade secret protection may also be justified by the economic theory. There is no need to justify commercial property, participatory claims or non-proprietary rights in terms of the economic theory. Traditional knowledge may be justified in terms of the economic theory for purposes of property protection in private law. Traditional knowledge protection is economically valuable and is a physically non-excludable resource. Its use is non-rivalrous and this is similar to the existing categories of intellectual property. This is most likely the reason why the South African legislature has opted to protect traditional knowledge as intellectual property in terms of the Traditional Knowledge Bill of 2007.²²⁴

4 7 Theory of Natural Monopoly

Ghosh²²⁵ developed a theory of natural monopoly²²⁶ as an alternative metaphor for intellectual property. According to Ghosh, the foundation for intellectual property has always

²²³ Ciro T 'The scarcity of intellectual property' (2005) 1 *JILT* 1-21 at 6.

²²⁴ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

²²⁵ Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U III LR* 1125-1183 at 1128.

been property. Intellectual property theory often justifies the exclusive rights granted by reference to the high fixed costs of production and the small marginal distribution cost of the subject matter of patents, copyright and trademarks. Ghosh states that this cost structure also justifies natural monopolies and their regulation. As such, he argues, the natural monopoly metaphor may also be used to ‘map the domain of regulation onto several doctrinal elements of patent, copyright, and trademark law.’²²⁷ However, the deregulation of traditional natural monopolies leads to the strengthening of private rights, which is not the case with intellectual property. When criticisms of natural monopoly are applied to intellectual property, the exclusivity of patents, copyrights and trademarks are challenged, which allows the development of intellectual property law to be more oriented towards the public interest. Ghosh argues that the purpose of a deregulation of intellectual property would be freedom from the stranglehold of rights owners on users, which hampers creative processes. The process entails a ‘re-regulation’ in terms of which the regulation structures are transformed rather than extinguished.

According to Ghosh,²²⁸ there are compelling reasons for scepticism of the treatment of intellectual property as a form of natural monopoly. However, there are useful lessons that may be learnt from the criticisms of natural monopoly. These lessons may successfully be applied in the ‘re-regulation’ of intellectual property. Ghosh²²⁹ identifies three types of criticisms of natural monopoly. The first questions assumptions about information and cost. The second criticism explores the idea that decreased government regulation would be possible if there were potential competition. In the third instance, that the politics and economics of regulation should take into account the political reform and recognition of

²²⁶ Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U Ill LR* 1125-1183 at 1138-1139: ‘A natural monopoly arises when the average costs of producing a product or service declines as more of the product or service is supplied to the market. Because of declining average costs, it is more efficient from the perspective of lowering the average cost of production to have one firm service the market rather than duplicate expenditures. Average costs are falling either because there are huge fixed costs to production or because the costs of producing an additional unit of the product or service are negligible.’ See Berg SV & Tschirhart J *Natural Monopoly Regulation: Principles and Practice* (1988) 12-24 and Spulber DF *Regulation and Markets* (1989) 513-514.

²²⁷ Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U Ill LR* 1125-1183 at 1128.

²²⁸ Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U Ill LR* 1125-1183 at 1150.

²²⁹ Ghosh S ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 2008 *U Ill LR* 1125-1183 at 1154. Also see Ghosh S ‘The intellectual property incentive: Not so natural as to warrant strong exclusivity’ (2006) 3 *SCRIPT-ed* 97-108 at 101.

consumer interests. Ghosh²³⁰ argues that the incentive theory justification for intellectual property is based on the same justifications for a natural monopoly. As such, the same scrutiny that is applied to natural monopoly should also be applied to intellectual property.

Ghosh²³¹ states that the processes of creating and inventing are costly and time-consuming. There are high fixed costs involved in the processes of inventing, yet once a new work is made public it is relatively costless to copy the work. For example, once the preliminary work and safety testing for a medicine has been done, it is relatively inexpensive to manufacture the actual medicine for the commercial market. This situation of high fixed costs and low distribution costs is frequently utilised for the justification of intellectual property exclusivity. This justification is similar to that of a natural monopoly. This combination of high fixed costs and low distribution costs would drive the market down to zero, or so it is argued. As a consequence, artificial scarcity needs to be created by way of exclusivity in order to avoid competition that leads to destruction of the market. Ghosh notes that '[n]atural monopoly-like justifications for intellectual property are most prevalent in the controversial areas of database protection, computer software, and biotechnology'.²³²

When applying the criticisms of natural monopoly to intellectual property, the first problem is determining the right amount of incentive to ensure continued production of creations. The tendency is to make rights as strong as possible. Ghosh²³³ proposes 're-regulation' of intellectual property as a solution to this problem. This implies that intellectual property should be seen as a system of regulation instead of a system of property. Regulation and property are not opposites, but by acknowledging intellectual property as a regulatory system, an understanding of intellectual property law as public law may be developed. The deregulation of intellectual property rights does not merely imply the expansion of private rights, but the loosening of exclusionary rights. Such a deregulation of intellectual property rights requires that the idea of strong property rights shifts more towards a regime that recognises limits on exclusion.

²³⁰ Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U III LR* 1125-1183 at 1157.

²³¹ Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U III LR* 1125-1183 at 1157-1158.

²³² Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U III LR* 1125-1183 at 1159.

²³³ Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U III LR* 1125-1183 at 1160-1166.

This theory is not so much a theory for the justification of immaterial property rights, but a proposal for how intellectual property products and other creative products may be regulated in order to make provision for other rights and interests as well, for example the public domain or intellectual property commons and private interests such as the right to freedom of expression, the right to education or the right to bodily integrity. This theory was specifically developed with the intellectual property categories of patents, copyright, designs, trademarks and trade secrets²³⁴ in mind. However, as Ghosh notes, it is also particularly relevant for digital copyright and biotechnological products. It should also be possible to apply the theory to commercial information and confidential information. The theory of natural monopoly currently has no applicability to the category of traditional knowledge. However, once traditional knowledge receives protection under the existing categories of intellectual property or even as a *sui generis* form of intellectual property, it may be possible to apply the theory of natural monopoly to traditional knowledge as well.

4 8 The Commons

4 8 1 Introduction

Macmillan²³⁵ states that an important part of intellectual property scholarship involves discussion about the interaction of intellectual property with the public domain. This important debate has been driven by concerns about the imperialistic tendencies of intellectual property that is extending to include new types of intellectual activity as well as extending existing intellectual property rights.²³⁶ In this section three important questions need to be addressed. Firstly, where did the notion of a commons originate and why is it necessary to apply the concept to intellectual property? Secondly, what exactly is the commons (or the public domain, as it is more often termed when referring to intellectual property)? Finally, how should the intellectual property commons develop further?

In her analysis of the relationship between intellectual property and the public domain, Macmillan²³⁷ states that the concept of the public domain in intellectual space depends

²³⁴ In American law, trade secrets are regarded as a category of intellectual property.

²³⁵ Macmillan F 'Altering the contours of the public domain' in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 98-117.

²³⁶ Macmillan F 'Altering the contours of the public domain' in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 98-117 at 98-99.

²³⁷ Macmillan F 'Altering the contours of the public domain' in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 98-117 at 99.

profoundly on Roman law concepts that govern physical space. These concepts acknowledged different non-exclusive, but not necessarily public, uses of property. These concepts were first explored by Rose.²³⁸ The concepts of *res communes* and *res publicae* have been used most often in the debate about intellectual property and the public domain. *Res communes* refer to things which are by their nature incapable of being owned, whilst *res publicae* refer to things which are open to the public due to the working of a law. Macmillan infers that these concepts have translated to the concepts of the commons and the public domain in the current debate about intellectual property. However, these two concepts are often confused or used interchangeably, which has not helped to simplify the interaction between intellectual property and the intellectual public space.²³⁹

Macmillan²⁴⁰ argues that it is not the purpose of intellectual property to exclude the whole of the intellectual property commons. Intellectual property excludes certain parts of the intellectual space from being exclusively owned. However, it is not always clear whether these parts are excluded because they are incapable of being owned by virtue of their legal nature²⁴¹ or whether they should be kept in the public domain as a matter of policy.²⁴² For example, certain innovations are not patentable since they are excluded by statute. Examples would be discoveries and scientific theories. Copyright does not protect ideas, but this distinction between unprotected ideas and protected expressions is vague and not applied consistently in courts.²⁴³ This interaction between property and the commons has been discussed by various persons from different academic fields.

4 8 2 The Tangible Commons

In his 1968 article on the commons, Hardin²⁴⁴ (a natural scientist) explains that the population growth problem is leading to the commons being destroyed. His article refers to the tangible commons of land, water and other natural resources. He proposes that there is no

²³⁸ See Rose CM ‘Romans, roads and romantic creators: Traditions of public property in the information age’ (2003) 66 *L & CP* 89-110 at 89.

²³⁹ Macmillan F ‘Altering the contours of the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 98-117 at 99-100.

²⁴⁰ Macmillan F ‘Altering the contours of the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 98-117 at 100-101.

²⁴¹ This relates to what Gray would refer to as legal non-excludability: Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307.

²⁴² Gray terms this moral non-excludability: Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307.

²⁴³ Macmillan F ‘Altering the contours of the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 98-117 at 100-101.

²⁴⁴ Hardin G ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248.

technical solution to the population problem, but that the solution lies in a fundamental extension in morality.²⁴⁵ Regarding the commons, he explains that the commons is being over-used and destroyed. Due to the population growth, the commons will no longer be able to accommodate the needs of all entities. The commons is being eroded by persons taking from the commons, for example herdsmen grazing cattle on a common pasture. The commons is also being destroyed by people putting things into it, for example pollution into a river.²⁴⁶ Hardin then proceeds to propose different ways in which the population growth may be regulated in order to spare the commons. However, he does not make use of the usual private property arguments in order to facilitate the conservation of the commons, but instead refers to wealth maximization and morality.²⁴⁷

Ghosh²⁴⁸ suggests that this solution of morality is ‘perhaps not inapposite to an appeal to property rights, which is a particular type of “social arrangement”’.²⁴⁹ He states that this morality approach may be the answer to the question of how the notions of distributive justice should influence the way intellectual property law manages the intellectual property commons. However, Ghosh notes that one must distinguish intellectual property from tangible property, which is the subject of Hardin’s²⁵⁰ article. During use of the tangible property commons, actions such as grazing and polluting can lead to the commons being overused. In the case of intellectual property, on the other hand, use of the commons entails creative and innovative processes that in fact expand the commons instead of overusing it. This assumes that the resource remains in the commons after it is used in the creation of an intellectual property work and is not propertised and consequently removed from the commons. Ghosh further defines ‘distributive justice’ simply as the way in which resources should be allocated among individuals in society, since he finds Hardin’s²⁵¹ notion of distributive justice (or morality, as Hardin term it) strained. Ghosh questions the reasons why the metaphor of the commons is so important in intellectual property debates when the rationale of intellectual property differs so radically from the concept of the ‘tragedy of the commons’ (as borrowed from Hardin). Ghosh subsequently proposes that a revision of the

²⁴⁵ Hardin G ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248 at 1243.

²⁴⁶ Hardin G ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248 at 1244-1245.

²⁴⁷ Hardin G ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248 at 1245-1248.

²⁴⁸ Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890.

²⁴⁹ Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 857.

²⁵⁰ Hardin G ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248.

²⁵¹ Hardin G ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248.

notion of the commons is necessary in order to afford room for the rationale behind intellectual property.²⁵²

Rose describes the ‘tragedy of the commons’ as follows:

‘When things are left open to the public, they are thought to be wasted by overuse or underuse. No one wishes to invest in something that may be taken from him tomorrow, and no one knows whom to approach to make exchanges. All resort to snatching up what is available for “capture” today, leaving behind a wasteland. From this perspective, “public property” is an oxymoron: things left open to the public are not property at all, but rather its antithesis.’²⁵³

Rose²⁵⁴ notes that the modern doctrines do not explain why and under which circumstances property rights may appear to vest in the public at large or what she calls the ‘unorganised public’. Instead, she turns to the older doctrines of ‘public trust’, ‘prescription’ and ‘custom’ in order to find some insights into the nature of ‘inherently public property’. She notes that ‘service to commerce was a central factor in defining as “public” such roads and waterways. Used in commerce, some property had qualities akin to infinite “returns to scale”’. Consequently, here the commons was not tragic, but comedic, in the classical sense of a story with a happy outcome.’²⁵⁵ This is the case not only because it may infinitely expand health, but also because it could socialise the members of an otherwise atomised society.²⁵⁶

4 8 3 Utilitarianism and Distributive Justice

In what he terms ‘the fable of the commons’, Ghosh²⁵⁷ explains that if a person using the commons of land sees a new piece of land, that person as well as all the other users of the commons want to arrive at the land first. When they arrive, however, they still find the same tensions of overuse with which to struggle. By contrast, intellectual property is about the voyage and ultimately about exploring new areas in order to increase the existing commons.

²⁵² Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 858-861.

²⁵³ Rose CM ‘The comedy of the commons: Custom, commerce, and inherently public property’ (1986) 53 *U Chi LR* 711-781 at 712.

²⁵⁴ Rose CM ‘The comedy of the commons: Custom, commerce, and inherently public property’ (1986) 53 *U Chi LR* 711-781 at 722.

²⁵⁵ Rose CM ‘The comedy of the commons: Custom, commerce, and inherently public property’ (1986) 53 *U Chi LR* 711-781 at 723.

²⁵⁶ See Rose CM ‘The comedy of the commons: Custom, commerce, and inherently public property’ (1986) 53 *U Chi LR* 711-781 at 723-749 for a full discussion of the older doctrines of ‘public trust’, ‘prescription’ and ‘custom’.

²⁵⁷ Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 861.

Yet there are also similarities between the intellectual property commons and the traditional commons, in the fact that both emphasise the dilemma of resource management.²⁵⁸ Also, intellectual property is similar to real property (tangible property) due to the reality that both these forms create an arrangement of rights that determine which uses of a resource are allowed and which are not.²⁵⁹

Ghosh²⁶⁰ further discusses how the commons might be governed through goals of distributive justice. He states that his ‘fable of the commons’ could make use of technical, legal and social arrangements in order to regulate the creative and inventive processes. There are two possible normative principles that could guide the process of creating a regulatory system, namely ‘utilitarianism’ and ‘distributive justice’. These correspond to Hardin’s²⁶¹ notions of ‘welfare maximization’ and ‘morality’. Ghosh argues that these two notions must be used together, as alone they do not suffice. However, he is of the opinion that Hardin’s jump to morality was somewhat simplistic. He suggests that merely defining property rights appropriately and enforcing them accordingly can possibly solve the problem of resource allocation.²⁶²

‘Distributive justice’ as a normative guide should be applied instead of wealth maximization when defining these property rights. The problems standing in the way of the application of wealth maximization are the problem of progress and the problem of markets respectively, as Ghosh argues. By applying wealth maximization, it can only be determined that the commons should grow in line with progress, but not how that growth should take place. The basic problem of who should benefit from the progress is not answered by wealth maximization. By merely allocating the resource to the highest bidder, notions of justice are not taken into account. Somewhere, ‘distributive justice’ also needs to feature in designing a system to regulate the intellectual commons. Ghosh proposes that intellectual property should be

²⁵⁸ Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 861.

²⁵⁹ Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 863.

²⁶⁰ Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890.

²⁶¹ Hardin G ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248.

²⁶² Ghosh S ‘The fable of the commons: Exclusivity and the construction of intellectual property markets’ (2007) 40 *UC Davis LR* 855-890 at 864-866.

considered in terms of three distributional concerns, namely distribution among creators; distribution among creators and users; and intergenerational distribution.²⁶³

4 8 4 Non-excludability

Gray's²⁶⁴ explanation of 'excludability' sets out three grounds on which a resource may be deemed non-excludable, namely physical, legal and moral. Physical non-excludability entails that it is impossible or impractical for an owner of a particular resource to exclude third persons from the resource and for this reason the resource may not be termed property. Legal non-excludability envisions the instance where there was some form of legal protection available to the owner of a resource, but that he failed to utilise it and for this reason the courts will not protect the resource as property. The third form of non-excludability, which is the most important for this section of the chapter, relates to moral non-excludability. This refers to the situation where it is so important for a particular resource to remain in the commons, that it would be *contra bonos mores* to remove it from the commons by propertising it. The reason why these resources are non-excludable is because 'undesirable or intolerable consequences would flow from allowing any one person or group of persons to control access to the benefits which they confer'.²⁶⁵ Where legislation is changed to include resources which were previously in the commons, this threatens the existence and quality of the commons.

4 8 5 The Second Enclosure and the Public Domain

In his article on the second enclosure movement and the public domain, Boyle²⁶⁶ describes the enclosure of common land, where the argument had been that private property would be better conserved by the owner than a commons would by the users sharing a resource.²⁶⁷ He states that this is relevant to intellectual property, since there is a second enclosure movement taking place at the moment. He calls this 'the enclosure of the intangible commons of the mind'.²⁶⁸ Things that were formerly regarded as being either common property or

²⁶³ Ghosh S 'The fable of the commons: Exclusivity and the construction of intellectual property markets' (2007) 40 *UC Davis LR* 855-890 at 866-870.

²⁶⁴ Gray K 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307 at 268-276.

²⁶⁵ Gray K 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307 at 280-281.

²⁶⁶ Boyle J 'The second enclosure movement and the construction of the public domain' (2003) 66 *L & CP* 33-74. Also see Boyle J *The Public Domain: Enclosing the Commons of the Mind* (2008).

²⁶⁷ Boyle J 'The second enclosure movement and the construction of the public domain' (2003) 66 *L & CP* 33-74 at 33-36. Also see Boyle J *The Public Domain: Enclosing the Commons of the Mind* (2008).

²⁶⁸ Boyle J 'The second enclosure movement and the construction of the public domain' (2003) 66 *L & CP* 33-74 at 36-37. Also see Boyle J *The Public Domain: Enclosing the Commons of the Mind* (2008).

uncommodifiable, are being added to the property regime. This is done by granting new rights or extending existing rights. He takes the example of the human genome to illustrate this tendency. He states that supporters of the enclosure movement would reason that there should be patents granted to cover human genes. Only with the guarantee of property rights would there be investment in the production of drugs and gene therapies. In other words: private property saves lives. People opposing the enclosure movement, by contrast, would argue that the human genome is part of the ‘common heritage of mankind’ and that it should not and cannot be owned. Also, by the state handing monopolies to only a few entities, innovation may be slowed down.²⁶⁹

The most interesting example of inconsistent application of the ‘common heritage of mankind’ concept is in *Moore v Regents of University of California*,²⁷⁰ a California Supreme Court case where it was decided that Moore did not have a property interest in the cells derived from his spleen. The court found that the process in terms of which researchers share cell lines would be slowed down if private property rights were to be given to ‘sources’. However, the doctors who invented the billion-dollar cell line from Moore’s spleen were granted a patent. This was justified by the court on the strength that property rights in the latter case are a necessary incentive to encourage research.²⁷¹ Boyle adds that the human genome is not the only area being enclosed. The expansion of intellectual property rights has included business method patents and trademark antidilution rulings in the American courts. The former limits imposed on intellectual property by the public domain are steadily being eroded. The point of departure regarding intellectual property has always been that intellectual property rights are the exception and not the norm. The point of departure should still be that ideas and facts should not be propertised, but should remain in the public domain.²⁷²

This concept has recently been questioned extensively. Patents are being stretched to cover ideas that were formerly not patentable. There have also been attempts to grant property rights over mere compilations of facts, which Boyle argues is more troubling. One of the

²⁶⁹ Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 37. Also see Boyle J *The Public Domain: Enclosing the Commons of the Mind* (2008).

²⁷⁰ 51 Cal 3d 12; 271 Cal Rptr 146; 793 P 2d 479 1991.

²⁷¹ Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 37-38. Also see Boyle J *The Public Domain: Enclosing the Commons of the Mind* (2008).

²⁷² Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 38-39. Also see Boyle J *The Public Domain: Enclosing the Commons of the Mind* (2008).

goals of intellectual property has always been to protect the commons to ensure access to materials. More recently the goal of intellectual property seems to be that there should be as much private property as possible. The assumption appears to be that any commons is wasteful or uneconomical. The ultimate question posed by Boyle is: ‘How much of the intangible commons must we enclose?’²⁷³

4 8 6 The Public Domain or Intangible Commons

MacQueen and Waelde²⁷⁴ define the importance of the concept of the ‘public domain’ in the cultural and scientific context as ‘a body of knowledge and information to which there is general access for use for purposes such as education (formal and informal) and the further development of knowledge, understanding, creativity and inventiveness’.²⁷⁵ It is important to have a well-stocked public domain in order for innovation to continue in the cultural as well as scientific areas. This is at least as important as the incentive created by intellectual property’s reward of exclusivity and financial reward. Both of these methods have the same goal, namely to encourage and enable ongoing innovation. Therefore it is at least as important to define the public domain and determine what is required in order to guarantee its continued existence as it is to promote the growth and enforcement of intellectual property rights.²⁷⁶ MacQueen and Waelde²⁷⁷ depart from the point where the public domain is perceived by lawyers as being the opposite of property. However, they caution that this has the potential to be a serious over-simplification. They warn that ‘free use’ does not automatically mean ‘use for free’.²⁷⁸ ‘Free is often better understood as in free speech (or indeed, freedom) rather than as in free beer.’²⁷⁹

Boyle²⁸⁰ explores this concept of ‘free.’ He asks whether ‘free’ means:

²⁷³ Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 39-40. Also see Boyle J *The Public Domain: Enclosing the Commons of the Mind* (2008).

²⁷⁴ MacQueen H & Waelde C ‘Introduction: The many faces of the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) xi-xviii.

²⁷⁵ MacQueen H & Waelde C ‘Introduction: The many faces of the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) xi-xviii at xi.

²⁷⁶ MacQueen H & Waelde C ‘Introduction: The many faces of the public domain’ in Waelde C & MacQueen H *Intellectual Property – The Many Faces of the Public Domain* (2007) xi-xviii at xii.

²⁷⁷ MacQueen H & Waelde C (eds) ‘Introduction: The many faces of the public domain’ in Waelde C & MacQueen H *Intellectual Property – The Many Faces of the Public Domain* (2007).

²⁷⁸ MacQueen H & Waelde C ‘Introduction: The many faces of the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) xi-xviii at xiii-xiv.

²⁷⁹ As put by Richard Stalman – see the GNU website at <http://www.gnu.org/philosophy/free-sw.html> (last visited 21 July 2010).

²⁸⁰ Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 62.

‘Free trade in expression and innovation as opposed to monopoly? Free access to expression and innovation, as opposed to access for pay? Or free to innovation and expression, in the sense of not being subject to the right of another person to pick and choose who is given access, even if all have to pay some flat fee? Or is it common ownership and control that we seek, including the communal right to forbid certain kinds of uses of the shared resources?’²⁸¹

What the public domain means depends on ‘why we care about the public domain, on what vision of freedom or creativity we think the public domain stands for, and what danger it protects against’.²⁸² The answer is that there is not only one public domain, but different versions thereof. The ‘commons’ has frequently been used to refer to origins of creation that are outside of the intellectual property regime.²⁸³

Cahir²⁸⁴ explores the question whether the public domain is a right or a liberty. He maintains that if the public domain can be described as a right, this will strengthen its position substantially. If the public at large have vested rights in the public domain, this strengthens the arguments brought against limiting the public domain by means of private contracts.²⁸⁵ According to the structure of rights as set out by Hohfeld,²⁸⁶ every right has a corresponding duty. A privilege, on the other hand, imposes no correlative duty and as such there is no right. If this analysis is applied to the public domain, there has to be a corresponding duty on some person in order for there to be a right to the public domain. This would lead to the conclusion that individuals have merely a privilege to use objects in the public domain. When examining the statutory exemptions from intellectual property infringement, it appears that these are also privileges and not rights.²⁸⁷

²⁸¹ Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 62.

²⁸² Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 62.

²⁸³ Boyle J ‘The second enclosure movement and the construction of the public domain’ (2003) 66 *L & CP* 33-74 at 62. See Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 268-276 on excludability and specifically moral non-excludability.

²⁸⁴ Cahir J ‘The public domain: Right or liberty?’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 35-52.

²⁸⁵ Cahir J ‘The public domain: Right or liberty?’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 35-52 at 35.

²⁸⁶ Published in two articles: Hohfeld W ‘Some fundamental legal conceptions as applied in judicial reasoning’ (1913) 23 *Yale LJ* 16-59 and Hohfeld W ‘Fundamental legal conceptions as applied in judicial reasoning’ (1916) 26 *Yale LJ* 710-770.

²⁸⁷ Cahir J ‘The public domain: Right or liberty?’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 35-52 at 39-40.

4 8 7 **The Public Domain in the Context of Copyright**

In an article examining the public interest in the public domain, Davies²⁸⁸ defines the public domain specifically in the context of copyright to include all literary and artistic works of which the term of protection has expired and as such are no longer protected by copyright or other rights. At the end of such a term of protection, the work may be freely used, since it falls in the public domain. Once a work falls within the public domain, permission is no longer required in order to use the work and no remuneration needs to be paid. The work is also no longer protected by the Universal Copyright Convention,²⁸⁹ which acknowledges the public domain. A work would also fall in the public domain if it did not qualify for copyright protection in the first place, such as if the work lacked originality or did not comply with one of the other requirements for the subsistence of copyright.²⁹⁰ Davies further examines the option of a paying public domain, which entails royalties being collected after the expiry of a work's copyright term. These royalties would then be used for the benefit of living authors or for other cultural purposes. These royalty payments are generally perceived as a form of tax.²⁹¹

Deazley²⁹² states that in understanding the public domain specifically of copyright, one needs to distinguish clearly between the two connected concepts of 'access to' and 'use of' a work. He points out that copyright confers a bundle of rights upon the owner of the work. The owner is then able to prevent other parties from using the work without permission from the owner of the copyright. The public domain in the context of copyright accordingly allows use of a work without the necessity of permission. The second consideration is that once a work is published, it enters a public space (which Deazley calls the 'intellectual commons'). This aspect refers to the work being accessible to the public. In other words, the author is no longer the only person with control over access to the work as was the case before the work was published. According to Deazley's description, the intellectual commons hence consists of two separate types of works, namely those which are protected by copyright and those

²⁸⁸ Davies G 'The public interest in the public domain' in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 86-97.

²⁸⁹ United Nations Universal Copyright Convention of 6 September 1952 (http://portal.unesco.org/culture/en/ev.phpURL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 9 June 2010)). South Africa is not a party to this convention.

²⁹⁰ Davies G 'The public interest in the public domain' in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 86-97 at 86.

²⁹¹ Davies G 'The public interest in the public domain' in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 86-97 at 91-92.

²⁹² Deazley R 'Copyright's public domain' in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 21-34.

falling in the public domain. These works would not fall into the intellectual commons until they are disclosed by being made available to the public through publishing.²⁹³

However, Deazley²⁹⁴ cautions that these first distinctions are too simplistic. It is also necessary for the public domain to include the aspects of copyrighted works where permission is not required in order to use the work. This would be the case with the ideas within a copyrighted work. Such ideas are not protected by copyright and may as a result be used without prior consent of the copyright owner. Also, the use exceptions, as set out in the Copyright Act, would fall in this category.²⁹⁵ In South Africa, there are certain statutory fair use exceptions set out in the Copyright Act 98 of 1987, where prior permission is not required to use the work. Dean²⁹⁶ states that these exemptions are instances where it is considered to be in the public interest that the owner of the copyright should not have a monopoly where the performance of certain acts in relation to the copyrighted work is concerned. These exemptions are based on the assumption that a copyright infringement has transpired and that this infringement is then excused by virtue of the exemption.²⁹⁷ The first exemption in the Copyright Act 98 of 1978 is the Fair Dealing exemption, as set out in section 12(1):

‘Any fair dealing with a literary, musical or artistic work, or with a broadcast or published edition, does not infringe that copyright when it is –

- (a) for the purposes of research or private study by, or the personal private use of, the person using the work;
- (b) for the purposes of criticism or review of that work or of another work; or
- (c) for the purposes of reporting current events –
 - i) in a newspaper, magazine or similar periodical; or
 - ii) by means of broadcasting or in a cinematographic film.’²⁹⁸

Section 12(1) (b) and (c) also apply to cinematographic films, sound recordings and computer programs. Where a work deals fairly in terms of paragraphs 12(1) (b) and (c) (i), it must be

²⁹³ Deazley R ‘Copyright’s public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 21-34 at 22-24.

²⁹⁴ Deazley R ‘Copyright’s public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 21-34.

²⁹⁵ Deazley R ‘Copyright’s public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 21-34 at 24-25.

²⁹⁶ Dean OH *Handbook of South African Copyright Law* (1987) 1-51.

²⁹⁷ Dean OH *Handbook of South African Copyright Law* (1987) 1-51.

²⁹⁸ Copyright Act 98 of 1978 sec 12(1).

accompanied by an appropriate acknowledgement.²⁹⁹ Specifically, the source of the work as well as the name of the author (if it appears on the work) must be mentioned. ‘Fair dealing’ is a rather vague concept, possibly in order to enable the court to take all circumstances into consideration when deciding whether an infringement may be excused.³⁰⁰ There are a further number of exemptions which will not be discussed at length for the purposes of this section.³⁰¹ The purpose is merely to give a number of examples from South African copyright law where certain aspects of copyright works would fall in the public domain. Further exemptions include quotations,³⁰² illustrations for teaching,³⁰³ ephemeral copies³⁰⁴ and reverse engineering of products.³⁰⁵

There are furthermore certain criticisms of a public domain for copyright, as Deazley³⁰⁶ notes. The two main problems with the public domain is that firstly, it is not accurately defined and may vary according to who uses the public domain. Secondly, it is also possible that a misappropriation of traditional knowledge may be justified in terms of the public domain.

4 8 8 The Public Domain and Traditional Knowledge

This link between traditional knowledge and the public domain is further explored by Gibson.³⁰⁷ She states that historically, the appropriation of traditional knowledge by colonisers has been justified by the doctrine of discovery. The traditional knowledge was regarded as ‘natural’ or part of the global heritage of humanity and as a consequence it was there for all’s benefit. This formed an important aspect of the imperialist process, in terms of which colonised peoples’ culture and knowledge were dominated by the ‘superior’ knowledge of the coloniser. Gibson also argues that in the current debate relating to the

²⁹⁹ Copyright Act 98 of 1978 sec 15(4), 16, 17, 18 and 19B.

³⁰⁰ Dean OH *Handbook of South African Copyright Law* (1987) 1-51 – 1-52.

³⁰¹ See further Dean OH *Handbook of South African Copyright Law* (1987) 1-51 – 1-60F on the exemptions to copyright infringement.

³⁰² Copyright Act 98 of 1978 sec 12(3).

³⁰³ Copyright Act 98 of 1978 sec 12(4).

³⁰⁴ Copyright Act 98 of 1978 sec 12(5).

³⁰⁵ Copyright Act 98 of 1978 sec 15(3).

³⁰⁶ Deazley R ‘Copyright’s public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 21-34 at 31-33.

³⁰⁷ Gibson J ‘Audiences in tradition: Traditional knowledge and the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 174-188.

expansion of intellectual property rights, traditional knowledge is still treated as part of a common heritage instead of creative knowledge of the indigenous communities.³⁰⁸

More recently, on an international level, there have been calls in favour of the protection of traditional knowledge as property and also as an integral part of the unity and dignity of indigenous communities.³⁰⁹ Gibson³¹⁰ states that the position of traditional knowledge within the public domain as defined by modern intellectual property law is a very important aspect of the debate about the expansion of intellectual property rights. Currently, this construction of traditional knowledge as part of the public domain still enables the appropriation of traditional knowledge. This leads to arguments that access to traditional knowledge cannot be denied, because it is legally or morally impossible. The public domain is used by groups with commercial interests to argue in favour of access to the resources. Absurdly, these commercially interested groups sometimes argue that traditional communities are attempting to expand intellectual property rights by seeking to protect their traditional knowledge.³¹¹ Therefore it appears that the two separate debates about the expansion of intellectual property rights and the protection of traditional knowledge sometimes get confused. The way in which traditional knowledge is construed as part of the international public domain does not account for cultural and political identity linked to the traditional knowledge. This does not keep in mind the creative process that leads to the knowledge, which is treated as a mere product to be extracted by companies with commercial interests.³¹²

The assimilation of traditional knowledge into the public domain also raises questions pertaining to the ‘public’ character of the public domain. The public domain operates on a global scale and accordingly the ‘public’ is portrayed as a ‘global public’. This ‘global public’ also includes the traditional communities, albeit without their consent. This means

³⁰⁸ Gibson J ‘Audiences in tradition: Traditional knowledge and the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 174-188 at 174.

³⁰⁹ See Chap 3 (Unconventional Immaterial Property Interests) on traditional knowledge and the current position in South African law.

³¹⁰ Gibson J ‘Audiences in tradition: Traditional knowledge and the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 174-188.

³¹¹ Gibson J ‘Audiences in tradition: Traditional knowledge and the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 174-188 at 175-178.

³¹² Gibson J ‘Audiences in tradition: Traditional knowledge and the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 174-188 at 178.

that the colonised and the coloniser are in the same territory competing for the traditional knowledge as a product.³¹³

4 8 9 The Public Domain in the Context of Patents

Furthermore, the public domain specifically in the context of patents deserves some discussion. Wallace and Mayer³¹⁴ argue that by granting ‘patents on life’, access to new biological discoveries and their applications are being restricted, which in turn limits the acquisition of new knowledge. The patent system does not merely restrict access, but controls that which constitutes scientific knowledge itself. The ‘public domain’ of knowledge about human, animal and plant biology is changing shape entirely. Preference is being given to knowledge which may be patented and that which is communal is neglected, which may lead to damaging effects particularly in developing countries.³¹⁵ Without the protection of intellectual property, companies will be unwilling to invest in developing a product for fear that other companies will copy the product.³¹⁶ Wallace and Mayer conclude that even though patents are mainly used in order to prevent the imitation of inventions and to secure markets, patenting has increasingly been driven by other motivations. These include ‘blocking competitors; increasing the company’s reputation and value; exchanging value with partners, licensees and investors; and controlling internal performance and motivations.’³¹⁷ Patent holders may prevent other companies from using the particular, patented knowledge. Subsequently these competitors are also barred from using the knowledge to make improvements on a particular product and selling it in competition with the holder of that patent.

4 9 Conclusion

The question that this chapter addressed is why and under which circumstances immaterial property rights should and could be recognised and protected under the constitutional

³¹³ Gibson J ‘Audiences in tradition: Traditional knowledge and the public domain’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 174-188 at 185-187.

³¹⁴ Wallace H & Mayer S ‘Scientific research agendas: Controlled and shaped by the scope of patentability’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 189-199.

³¹⁵ Wallace H & Mayer S ‘Scientific research agendas: Controlled and shaped by the scope of patentability’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 189-199 at 189.

³¹⁶ Wallace H & Mayer S ‘Scientific research agendas: Controlled and shaped by the scope of patentability’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 189-199 at 191.

³¹⁷ Wallace H & Mayer S ‘Scientific research agendas: Controlled and shaped by the scope of patentability’ in Waelde C & MacQueen H (eds) *Intellectual Property – The Many Faces of the Public Domain* (2007) 189-199 at 197.

property clause. For some of the categories of immaterial property interests there was also the additional question whether the particular category should be recognised and protected as property in private law. As becomes apparent from the analysis above, property theories that are already problematic in the context of tangible property are even more difficult to apply to intellectual property and other forms of immaterial property interests. As Hettinger³¹⁸ notes, the nonexclusive nature of intellectual property as well as the restrictions that intellectual property places on the free flow of information create problems in justifying the institution of intellectual property. Social utility is an important consideration when attempting to justify the protection of intellectual property. Hettinger³¹⁹ comes to the conclusion that the protection of the right to copyright is easier to justify than the right to patents or trade secrets. The reason for this is that patents restrict the use of an idea, while copyright prohibits only the copying of the expression of the idea and does not restrict use of the idea itself. Trade secrets are also more problematic, since they do not require disclosure to the public, so no benefit to the public becomes evident. Some of the unconventional immaterial property interests may be included under intellectual property categories and their protection justified accordingly, while others' protection is not justified adequately by property theories and may need other theories for justification.

It is both unpractical and unnecessary to consider the justification of the protection of unconventional categories of immaterial property that are not protected as property in private law, but under other areas of private law or in public law in terms of property theories. Commercial property, namely debts and claims; shares; goodwill; and state-granted licenses, permits and quotas already receive protection in private law under areas other than property law or in public law. The reason why it is unnecessary to consider the justification of the protection of these interests in terms of property theories is that it only needs to be determined whether these interests may be recognised and protected under the constitutional property clause; and this is not determined by reference to property or other theories. The reason why these interests could be protected under the property clause is rather due to the fact that they share certain characteristics with intellectual property and property; and furthermore there is no other constitutional clause that could possibly provide protection to these interests.

³¹⁸ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 51.

³¹⁹ Hettinger EC 'Justifying intellectual property' (1989) 18 *Phil & Pub Affairs* 31-52 at 51-52.

The justification of the protection of participatory claims also needs no consideration in terms of the property theories, because they are recognised and protected under separate constitutional property clauses specifically aimed at socio-economic rights. It is hence unlikely that these interests would be adjudicated in terms of the property clause although it is possible in principle.

The labour theory is still a strong theory for the justification of the protection of intellectual property interests. However, it becomes clear that it does not justify unlimited rights, but that the rights are subject to both the private and public interests. From Gray's formulation of excludability, it may be inferred that immaterial property interests are physically non-excludable, but may be legally excludable in the instances where statutes afford protection and such protection is invoked by the holder of the resource. Furthermore there are also certain morally non-excludable resources that should stay in the public domain. The protection of intellectual property (patents, copyright, registered designs and trademarks) may be justified by the labour theory.

The unconventional immaterial property interests' protection is more problematic to justify in terms of the labour theory and the principles of excludability may be of more use to determine whether a particular interest may enjoy property rule-type protection in private law. The protection of some unconventional immaterial property interests may also be justified by this theory, namely confidential information, trade secrets, digital copyright and some biotechnological products. Confidential information currently receives no private law protection and it is only the category of trade secrets that is currently protected in private law. Digital copyright is merely a form of copyright that possibly requires additional protection and its protection may be justified by the labour theory. Digital copyright is a legally excludable resource since it receives both copyright and contractual protection in private law. Similarly, protection of biotechnological products may be justified by the labour theory. However, certain biotechnological products may be morally non-excludable and as such would not receive any protection in private law or constitutional law.

The protection of traditional knowledge is not justified by the labour theory, but may be better justified by other theories not usually utilised for the justification of property, such as theories of distributive justice or human rights. In terms of the labour theory, only the last person who laboured on a work is rewarded, therefore the traditional community that held the

knowledge is not rewarded, but only the entity that derived the intellectual property product from the knowledge. The protection of commercial information is not justified by the labour theory, but rather depends on the excludability of the particular informational resource. Whether own effort was contributed is one of the factors in determining whether a participatory claim may be protected as property, at least in constitutional law, therefore the labour theory may have some influence in the justification of this category of unconventional immaterial property interests. The protection of non-proprietary rights may not be justified by the labour theory, since the labour theory envisions ownership as the property right awarded.

The reward and incentive theory are both based on the same idea that the disclosure of useful information should be rewarded by a property right. If the information is not disclosed, as is the case with trade secrets and confidential information, these theories are not useful. With the exception of trademarks, it is possible to justify the traditional immaterial property interests on the basis of the reward theory. In other words, the protection of patents, copyright and registered designs may be justified by the reward theory. Trademarks do not appear to confer any particular benefit on society except for prohibiting the confusion of the products or services sold under the trademark with other similar products or services, which is possibly not the kind of benefit envisioned by the reward theory.

The protection of the unconventional immaterial property interests is not clearly justified by the reward theory in all cases. The reward theory may be used for the justification of the protection of commercial information since some benefit to society is involved, although the issue of excludability is most likely of more importance. In the case of trade secrets and confidential information, the information is not made known; accordingly the reward theory has no applicability. Digital copyright may be protected under copyright and may be justified by the reward theory on the same grounds and some biotechnological products may be protected under patent law and as such these rights may also be justified by the reward theory. The reward theory is not a strong justification for the protection of traditional knowledge. Similar to the labour theory, it is only the last person working on the property product who receives a reward in terms of this theory; and as such the traditional community who holds the traditional knowledge is not rewarded.

The incentive theory is relevant for traditional immaterial property, namely patents, copyright and registered designs. With trademarks there is no visible value for society. Similar to the

reward theory, the incentive theory is more problematic to apply to the unconventional immaterial property interests than the traditional immaterial property interests. The theory may be useful for commercial information. In the case of confidential information and trade secrets, there is no benefit to the community since no information is made public. Digital copyright and biotechnological products may fall under the categories of intellectual property and their protection may consequently be justified in terms of the incentive theory. For traditional knowledge, the incentive theory is even less applicable for the justification of its protection than the reward theory, since traditional knowledge was created without any need for an incentive.

The spiritual theories may serve to justify the protection of the categories of traditional immaterial property interests, namely patents, copyright, designs and trademarks, but only insofar as they serve to secure a sphere of personal liberty. The personality theory as envisioned by Radin³²⁰ is only useful in the context of intellectual creations that are closely related to the personality, therefore perhaps only copyright. Similar to the other theories, it is also more problematic to apply the spiritual theories to the unconventional categories of immaterial property interests. The protection of digital copyright and biotechnological products may be justified by the spiritual theories insofar as they serve to secure a sphere of personal liberty and do not fall into the category of morally non-excludable resources. The protection of commercial information, confidential information and trade secrets is not justified by the spiritual theories. However, traditional knowledge protection could possibly be justified by the personality theory since the knowledge is so closely connected to the cultural and spiritual life of the holders of the traditional knowledge. These theories could also serve as a point of departure in developing a theory specifically for the justification of the protection of traditional knowledge.

The economic and natural monopoly theories may apply to the traditional as well as some of the unconventional forms of immaterial property. The economic theory is commonly utilised as a justification for the protection of intellectual property rights (patents, copyright, designs and trademarks), since they have high initial costs and low distribution costs and some form of protection is necessary in order to ensure continued investment in the creation of intellectual products. The protection of digital copyright, biotechnological products that are

³²⁰ Radin MJ 'Property and personhood'(1982) 34 *Stan LR* 957-1015.

not morally non-excludable, commercial information, confidential information and trade secrets may also be justified by the economic theory for the same reasons. Traditional knowledge is economically valuable and its use is non-rivalrous. However, it is currently physically non-excludable. The Traditional Knowledge Bill³²¹ has the purpose of remedying this situation by including traditional knowledge under the existing categories of intellectual property. Once this Bill becomes legislation, traditional knowledge would also constitute a legally excludable resource, similar to intellectual property.

The theory of natural monopoly is a criticism of the intellectual property system rather than a justification for the protection of intellectual property. It was devised with the traditional categories of intellectual property in mind, namely patents, copyright, designs, trademarks and trade secrets.³²² However, it may also be applied to the categories of digital copyright and biotechnological products; and possibly commercial information and confidential information.

The public domain is relevant for all categories of immaterial property, since the enclosure of the commons by the extension of intellectual property rights is such a great concern at this time. However, from all the theories discussed it becomes evident that the public interest always has an influence where property rights are concerned. Chapter 5 (Immaterial Property Interests under the Constitution) discusses the interpretation of the constitutional property clause and whether immaterial property interests may be protected under the property concept, but also the way in which it relates to public interest and the restrictions placed on constitutional property.

³²¹ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

³²² Trade secrets are viewed as a category of intellectual property in American law, which was the system used as the basis for the development of the theory of natural monopoly.

Chapter 5: Immaterial Property Interests in the Constitution

5.1 Introduction

Section 25 of the Constitution of the Republic of South Africa of 1996 protects property, but also provides for the deprivation and expropriation of property under specified circumstances and requirements. This chapter will focus mainly on the constitutional property concept and more specifically the question of whether, and if so which, specific immaterial property interests may be included as property under the property clause.

The inclusion of immaterial property interests as constitutional property will have two implications, namely protection and limitation. These two aspects are closely linked, but also separate and need to be treated as such. The property clause (section 25 of the Constitution) provides for the protection of property against state interference. Immaterial property interests would also be protected by this guarantee if it is included under the constitutional property concept. However, the clause also provides for the limitation of property rights in terms of the deprivation and expropriation provisions. The state is permitted to interfere with property rights in terms of the provisions for deprivation and expropriation. As long as the state adheres to these strict requirements, the interference is constitutionally justifiable. The reach of immaterial property interests may also be limited by public interests such as the public domain and private interests such as the right to freedom of expression.

It is crucial to note that recognition and protection of traditional and unconventional immaterial property interests in private law is different from their recognition and protection in constitutional law and the aims of the two forms of protection also differ. In private law the purpose is to get strong property-rule type protection for private rights against competing private parties.¹ In constitutional law recognition and protection is to get bill of rights type protection for private interests against the state. This is achieved in terms of the provisions for regulation and expropriation. Furthermore, constitutional recognition and protection provides bill of rights-type protection against competing constitutional and other rights of other private parties. This is done by weighing up the competing rights. In South Africa the purpose of

¹ Calabresi G & Melamed AD 'Property rules, liability rules, and inalienability: One view of the cathedral' (1972) 85 *Harvard LR* 1089-1128.

constitutional recognition and protection is perhaps also to enforce constitutional development of common law remedies to strengthen either claims or defences in terms of common law in private conflicts. Section 39 of the Constitution provides for the development of common law.²

The focus of this chapter does not fall on the private law recognition of traditional immaterial property interests or intellectual property rights, since these rights already enjoy strong property protection in private law. Similarly, some of the unconventional immaterial property interests already enjoy protection in private law albeit not under property law, for example commercial rights. Yet other unconventional immaterial property interests enjoy protection under public law, such as licenses. Some unconventional immaterial property interests are even protected under constitutional law under a constitutional right other than property, for example public participatory rights are protected under socio-economic rights in South African law. This is not the position in the United States or Germany, hence the necessity to protect these kinds of rights as constitutional property. However, in some cases the question is whether the unconventional immaterial property rights such as traditional knowledge should enjoy private law or statutory protection. This is discussed in more detail in Chapter 3 (Unconventional Immaterial Property Interests).

In all cases, the important question is whether these rights could enjoy constitutional protection in addition to their private law or statutory protection, because the private law or statutory protection does not extend to the purposes of constitutional threats and conflicts as mentioned before; or whether they might enjoy constitutional protection even though they do not enjoy private law protection, which might strengthen their effort to obtain private law or statutory protection; or whether they might pursue constitutional protection as property because they enjoy private law protection as non-property, but in constitutional conflicts they are unprotected and they share some characteristics with typical property interests. These shared characteristics are the following: Property interests have inherent or accrued economic value for the holder of the interest. Labour and resources were invested in the creation of the interest and the interest must have vested. In each case where constitutional property protection is suitable, there is also no other constitutional clause that could possibly provide protection to the specific category of immaterial property interests.

² Van der Walt AJ *Constitutional Property Law* (2005) 10-57.

The *First Certification* case³ may be used as a point of first reference in this enquiry, followed by an overview of the constitutional protection of immaterial property interests in South African law, foreign law and international law. In this case, the Constitutional Court was required to decide on the validity of the Constitution. There was an objection that the Constitution did not provide for the protection of intellectual property or mineral rights. However, the Court decided that the property clause was wide enough to include property interests that needed to be protected according to international standards. This has been interpreted to mean that intellectual property and possibly also other immaterial property interests that need to be protected would be included under the constitutional property clause.

According to section 39(1) (b) of the Constitution, a court, tribunal or forum must consider international law when interpreting the Bill of Rights. Dugard states that '[s]ection 35(1) [now section 39(1) (b)] strengthens the role of international law in the interpretive process as it obliges courts to apply international law where it is "applicable"'.⁴ He adds that basically every right in the Bill of Rights has a counterpart in an international human rights convention and mentions the example of the right to property, concluding that it is consequently 'difficult to imagine situations where public international law will not be applicable under s[ection] 35(1)'.⁵ Chapter 6 (Immaterial Property Interests in International Law) deals extensively with the human rights protection afforded to intellectual property rights (traditional immaterial property interests) and unconventional immaterial property interests in international law; as well as the implications for South Africa.

Section 39(1) (c) also states that a court, tribunal or forum may consider foreign law. In this chapter, the constitutional protection of immaterial property interests as property in Germany, The United States of America, Australia and Ireland is examined in order to find the best approach for South Africa.⁶ Patents,⁷ copyright⁸ and trademarks,⁹ for example, are included

³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

⁴ Dugard J 'The role of international law in the interpreting of the Bill of Rights' (1994) 10 *SAJHR* 208-215 at 212.

⁵ Dugard J 'The role of international law in the interpreting of the Bill of Rights' (1994) 10 *SAJHR* 208-215 at 212.

⁶ The Council of Europe and the First Protocol of the European Convention on Human Rights and Fundamental Freedoms 1950 are discussed in Chap 6 (The Protection of Immaterial Property Interests under International Law).

⁷ *BVerfGE* 36, 281 [1974].

under the general property clause in the German Basic Law¹⁰ and this approach could provide some guidance to South African courts. These and other examples from foreign law *may* be used to interpret the South African constitutional property clause. It is argued that this may be a useful aid in the context of immaterial property, since there are no South African cases yet clarifying which immaterial property interests may be protected under the South African property clause. This chapter discusses South African Constitutional law and comparative law, while international law is dealt with in Chapter 6 (Immaterial Property Interests in International Law).

5 2 Constitutional Immaterial Property Law

5 2 1 The *First Certification Case*

In the *First Certification* case¹¹ the Constitutional Court responded to an objection that the constitutional property clause failed to recognise the right to intellectual property. In the objection it was proposed that the intellectual property right advocated was a ‘universally accepted fundamental right, freedom and civil liberty’. The Court held that

‘[a]lthough it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies’.¹²

The Court apparently interpreted this tendency to mean that it was not a universally accepted norm to include a specific right to intellectual property in a separate constitutional clause. The Court cited article 27(2) of the Universal Declaration of Human Rights (UDHR)¹³ and article 15(1) (c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴ as examples of international conventions recognising the right to intellectual

⁸ *BVerfGE* 31, 229 [1971] (*Urheberrecht* case).

⁹ *BVerfGE* 51, 193 [1979] (*Warenzeichen* case).

¹⁰ Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949.

¹¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75. The Constitutional Court was required to decide whether the Constitution conformed to the Constitutional Principles set out in the Interim Constitution. In this paragraph of the decision, the Court had to decide whether the property clause was adequate in this respect. It had been argued that the Constitution did not protect intellectual property.

¹² *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

¹³ United Nations *Universal Declaration of Human Rights* (1948) 216 A [III]

(<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> (accessed 16 September 2009)). Article 27(20) of the UDHR reads as follows: ‘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.’

¹⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3

property. The Court stated that there is no *express* provision for intellectual property in the Austrian Basic Law of 1867; the Belgian Constitution 1831; Constitution of the Republic of Botswana 1966; the Canadian Charter of Rights and Freedoms 1982;¹⁵ Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949; the Constitution of India 1949; the Constitution of Japan 1946 or the Constitution of the United States of America 1787.¹⁶

The Court then proceeded to acknowledge that there are certain constitutions, particularly in Eastern Europe, which do contain express provisions for the protection of intellectual property. The Court mentioned article 51 of the Belarus Constitution;¹⁷ article 54(3) of the Bulgarian Constitution;¹⁸ article 39 of the Estonian Constitution¹⁹ and article 47 of the Macedonian Constitution²⁰ as examples of these express provisions. The Court concluded that the express provisions are ‘probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted’.²¹ The Court concluded that the term ‘property’ is wide enough, when used in a generic property clause, to include rights and interests that need to be protected according to international human rights standards.

(<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)). Article 15(1) (c) of the ICESCR protects everyone’s right ‘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’.

¹⁵ The Canadian Charter of Rights and Freedoms 1982 does not include a general property clause either and as such does not guarantee any form of property as a fundamental right. See Van der Walt *AJ Constitutional Property Clauses* (1999) 87.

¹⁶ The USA has a so-called intellectual property clause which deals specifically with copyright and patents. See sec 5.3.3 of this chapter.

¹⁷ Belarus Constitution 1994: Art 51(2) states that ‘[f]reedom of artistic, scientific, and technical creativity and teaching shall be guaranteed’ while art 51(3) states that ‘[i]ntellectual property shall be protected by law’.

¹⁸ Bulgarian Constitution 1991: Art 54(2) guarantees that ‘[a]rtistic, scientific, and technological creativity shall be recognized and guaranteed by the law’ and art 54(3) provides that ‘[t]he state shall protect all inventors’ rights, copyrights, and related rights’.

¹⁹ Article 39 (the Right to Intellectual Property) of the Estonian Constitution 1992 guarantees intellectual property as follows: ‘Authors shall have the inalienable right to their work. The state shall protect intellectual property rights.’

²⁰ The Macedonian Constitution 1991 art 47 provides for the protection of intellectual property as follows: ‘Article 47

- (1) The freedom of scholarly, artistic and other forms of creative work is guaranteed.
- (2) Rights deriving from scholarly, artistic or other intellectual creative work are guaranteed.
- (3) The Republic stimulates, assists and protects the development of scholarship, the arts and culture.
- (4) The Republic stimulates and assists scientific and technological development.
- (5) The Republic stimulates and assists scientific and technological development.’

²¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

5 2 2 **Arguments for the Protection of Intellectual Property under the Property Clause**

According to Roux and Davis,²² the Constitutional Court's²³ discussion about the failure of an explicit mention of intellectual property rights in section 25 or another clause of the final Constitution complicates the position of intellectual property rights. Roux and Davis²⁴ state that it may appear as though the court dismissed the objection raised against the failure to include intellectual property rights on the grounds that it is not a 'universally accepted' norm to protect intellectual property and that section 25 does not include intellectual property. They argue that there is in fact nothing that prevents the term 'property' to be so understood as to include intellectual property rights. Roux and Davis argue that 'given the importance of intellectual property rights in modern times, it would be wrong for a court to dismiss their claim to constitutional recognition'.²⁵ As a result, they submit that the Constitutional Court's decision should not be interpreted restrictively. According to their argument, the correct construction of the court's decision would rather be that the failure to expressly mention intellectual property rights in section 25 of the final Constitution does not violate the Second Constitutional Principle in Schedule 4 to the interim Constitution of the Republic of South Africa 200 of 1993, which holds that all universally accepted fundamental human rights should be protected in the final Constitution. Since intellectual property rights do not need to be protected in a separate constitutional clause and could still be protected under the constitutional property clause, the Court's decision did not violate the Second Principle. Roux and Davis²⁶ note that on such a reading of the *First Certification* case²⁷ there is still the opportunity to recognise intellectual property rights as constitutional property in future cases.²⁸

²² Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17.

²³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) par 75.

²⁴ Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17.

²⁵ Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17.

²⁶ Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17.

²⁷ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

²⁸ Also see Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-15. Roux agrees that the decision of the Constitutional Court leaves scope to include intellectual property as constitutional property.

Alexander²⁹ agrees that the *First Certification* case³⁰ supports a broad interpretation of constitutional property. The Constitutional Court rejected the objection that the Constitution was deficient due to the fact that it did not recognise mineral rights and intellectual property rights explicitly. According to Alexander,³¹ this opens up the possibility for these rights (mineral rights and intellectual property rights) to be classified as property in constitutional law. He states that the Court's duty in the *First Certification* case³² was merely to ensure that the Constitution complied with 'universally recognised' norms. Alexander³³ argues that since mineral rights and intellectual property rights are not universally recognised rights, there is no need to explicitly specify them.³⁴ He also notes that although it is uncommon for constitutional property clauses to specify which particular kinds of property rights are included, mineral rights and intellectual property are generally understood to be included in the general category of 'property' under constitutional property clauses.

According to Van der Walt,³⁵ the objection that the draft of the constitutional property clause failed to explicitly recognise intellectual property and mineral rights was rejected on the ground that there exists 'no universally recognised formulation of the constitutional guarantee of property'.³⁶ He states that the court's decision on this matter seems to be correct. In the *First Certification* case,³⁷ the Constitutional Court's duty was to certify that the proposed constitutional provisions conform to 'established and universally recognized norms'.³⁸ As Van der Walt notes, there 'is no universally recognized norm for the formulation of a constitutional property clause, particularly not as far as the description of property is

²⁹ Alexander GS *The Global Debate over Constitutional Property* (2006) 163.

³⁰ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

³¹ Alexander GS *The Global Debate Over Constitutional Property* (2006) 163.

³² *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

³³ Alexander GS *The Global Debate Over Constitutional Property* (2006) 163. Compare Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17 and Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-15. Roux and Davis argue that it is merely not a 'universally accepted' norm to protect intellectual property rights in a separate constitutional clause, while Alexander states that intellectual property is not a universally recognised right although it may still be protected under the constitutional property clause.

³⁴ Compare Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106, 110. Dean argues that there are general and specific reasons why intellectual property should be regarded as a 'universally accepted' fundamental right.

³⁵ Van der Walt AJ *Constitutional Property Law* (2005) 85-87.

³⁶ Van der Walt AJ *Constitutional Property Law* (2005) 85.

³⁷ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

³⁸ Van der Walt AJ *Constitutional Property Law* (2005) 86.

concerned'.³⁹ However, this does not mean that a specific class of property such as intellectual property is excluded simply because it is not explicitly mentioned. It is unusual to specify all the types of property that are generally accepted as 'property' for purposes of a constitutional property clause. Van der Walt⁴⁰ illustrates this point by referral to movable corporeal property which is not specified as property in section 25 of the 1996 Constitution either, yet the Constitutional Court and everyone else accepts that it is property for purposes of the clause. It becomes apparent that the failure to specify a certain category of property in a property clause does not constitute a fatal flaw on the part of the clause, nor does it mean that a certain category of property is not included in the clause simply because it is not mentioned. All of the above authors seem to agree, albeit for different reasons, that the constitutional property clause has scope to recognise and protect at least some immaterial property interests.

5 2 3 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*

The issue regarding intellectual property as well as mineral rights is not only, or perhaps not at all, whether these rights should be protected in a separate constitutional clause. Rather the issue is whether these rights should have been mentioned explicitly in the property clause and whether failure to do so means that these interests are not included under the property clause. The meaning of the Constitutional Court's decision in the *First Certification* case⁴¹ on the matter of the failure to specifically mention mineral rights in the property clause is not entirely clear and has on occasion been misinterpreted. In *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*,⁴² the Transvaal High Court decided that mineral rights were not 'property' within the meaning of section 25. The reason given by the High Court was that the *First Certification* case⁴³ decided that the right to mineral rights is not a universally accepted fundamental right. The court held that the drafters of the Constitution would have protected mineral rights explicitly as is the case in other jurisdictions if they had intended for mineral rights to be protected. It is generally viewed that

³⁹ Van der Walt AJ *Constitutional Property Law* (2005) 86.

⁴⁰ Van der Walt AJ *Constitutional Property Law* (2005) 86.

⁴¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 74.

⁴² 2002 (1) BCLR 23(T) at 29G-H.

⁴³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 74.

the court's decision on this point is incorrect.⁴⁴ Van der Walt states that even though the Constitutional Court stated in the *First Certification* case⁴⁵ that mineral rights are not a separate set of fundamental human rights and as such need not be specified in the Bill of Rights, this statement has to be read in the context of the judgment, bearing in mind the constitutional function of the court in that case. He argues that this statement is not authority for the broad proposition that mineral rights are not included as 'property' under the property clause. According to Van der Walt, this decision could have a profound effect on other immaterial property interests such as 'shares, intellectual property rights, debts and other monetary claims, commercial licenses, permits and quotas and other use or exploitation rights'.⁴⁶

In the *First Certification* case,⁴⁷ the Constitutional Court stated that it was very rare for a property clause to mention mineral rights explicitly and as such there is no universally recognised practice or need to protect mineral rights as a separate fundamental human right. Van der Walt⁴⁸ states that this cannot be interpreted to mean that mineral rights are not included under the property concept for purposes of the property clause. He argues that the general formulation of the property clause and the lack of specific references to the categories of property should lead to the opposite conclusion. In other words, where no specific reference is made to any categories of property, the conclusion drawn should rather be that all categories of property would be included under the property clause, provided that it is not specifically excluded.⁴⁹ According to Van der Walt,⁵⁰ any such category of property should probably be included as long as the law recognises it as property. He states that where a property interest is recognised in private law, such as is the case with mineral rights, such a category should readily be included as property for purposes of the property clause. Van der

⁴⁴ See Van der Walt AJ *Constitutional Property Law* (2005) 87 and Van der Walt (AJ) 'Resisting orthodoxy – again: Thoughts on the development of post-apartheid South African law' (2002) 17 *SA Public Law* 258-279, especially at 260-265, where Van der Walt discusses the *Lebowa Mineral Trust* case and more detailed reasons why the court came to the incorrect conclusion regarding the constitutional protection of mineral rights as property.

⁴⁵ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 74.

⁴⁶ Van der Walt AJ 'Resisting orthodoxy – again: Thoughts on the development of post-apartheid South African law' (2002) 17 *SA Public Law* 258-279 at 261 fn 11.

⁴⁷ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 74.

⁴⁸ Van der Walt AJ *Constitutional Property Law* (2005) 86-87. Also see Van der Walt AJ *Constitutional Property Clauses* (1999) 324.

⁴⁹ Also see Alexander GS *The Global Debate Over Constitutional Property* (2006) 163. Alexander agrees with the idea that a wider scope of constitutional property should be accepted where no categories are specified.

⁵⁰ Van der Walt AJ *Constitutional Property Law* (2005) 87.

Walt suggests that the High Court's incorrect conclusion may have been reached by relying on the 'old-fashioned privatist orthodoxy about the restricted scope of property law in Roman-Dutch law'.⁵¹ He notes that this still does not adequately explain the court's decision, since mineral rights are regarded as property in South African private law.⁵²

5 2 4 Arguments for the Inclusion of a Separate Intellectual Property Clause

Dean⁵³ examines the decision of the Constitutional Court in the *First Certification* case and argues that there are general reasons⁵⁴ for the recognition of intellectual property in the Constitution, but also that the right to intellectual property is universally accepted as a fundamental right. He argues that the reason for protecting intellectual property rights is to provide an incentive to creators to create works that will be beneficial to the public interest. He also states that intellectual property rights are protected under the United Nations Bill of Rights,⁵⁵ which was adopted by 48 votes with only 3 abstentions. The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁶ has 133 parties including Canada, Germany, India, Italy, Japan, Kenya, Namibia, the Netherlands, Philippines, Uganda, Zambia and Zimbabwe. South Africa had signed but not yet ratified the Covenant at the time of the Court's decision and still has not signed it to date. Dean⁵⁷ states that none of the aforementioned countries provided for the protection of intellectual property rights in their constitutions, which was used by the Constitutional Assembly to demonstrate that intellectual property rights are not universally accepted fundamental rights. These countries have, however, bound themselves to implement the Covenant's provisions and as a result also to grant protection to intellectual property rights as fundamental rights.⁵⁸

⁵¹ Van der Walt AJ *Constitutional Property Law* (2005) 87 and Van der Walt AJ 'Resisting orthodoxy – again: Thoughts on the development of post-apartheid South African law' (2002) 17 *SA Public Law* 258-279.

⁵² Van der Walt AJ *Constitutional Property Law* (2005) 87. See Van der Merwe CG *Sakereg* (2nd ed 1989) 559 and Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 667 where the authors agree that mineral rights are accepted as property in South African private law.

⁵³ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106, 110.

⁵⁴ These and other reasons why immaterial property should be protected are analysed and discussed in Chap 4 (The Value of Immaterial Property).

⁵⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁵⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

⁵⁷ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106, 110.

⁵⁸ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106, 110.

In the *First Certification* case,⁵⁹ Dean appeared on behalf of the Association of Marketers in order to argue for a separate constitutional right to intellectual property. Their submission was that the right to hold intellectual property is a universally accepted fundamental right and that the Second Constitutional Principle of the interim Constitution set the prerequisite that the Constitution should make provision for all universally accepted rights. Therefore they argued that the Constitution was defective since there was no provision for a right to intellectual property and as such the Constitutional Court should not have certified the Constitution. On Dean's⁶⁰ interpretation, the Constitutional Court stated that the right to hold intellectual property is not a universally accepted fundamental right and as a result the Constitution is not defective even though the right to intellectual property is not protected in a separate constitutional clause. Dean⁶¹ argues that this result is unsatisfactory and that this view is 'widely held in intellectual property circles'.⁶² However, it is now generally accepted that the Constitutional Court's decision in the *First Certification* case⁶³ does not prevent intellectual property from enjoying constitutional protection under the general constitutional property clause.⁶⁴

Dean⁶⁵ argues that there are general arguments that support the broad proposition that intellectual property should be recognised in the Bill of Rights. These arguments are useful whether the proposition is that intellectual property should be recognised in a separate constitutional clause as Dean argues; or that intellectual property should be included under the general property clause, which is the more widely accepted line of reasoning. Dean's arguments are based on the incentive theory for promoting creative work, the international

⁵⁹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

⁶⁰ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106.

⁶¹ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106.

⁶² It is unclear whether this perhaps refers to practitioners, since there does not appear to be any other scholarship on the subject.

⁶³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

⁶⁴ See Van der Walt AJ *Constitutional Property Law* (2005) 86, Alexander GS *The Global Debate Over Constitutional Property* (2006) 163, Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17 and Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-15. Also see Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 19, where he concedes that intellectual property may still be recognised and protected despite the lack of an explicit constitutional clause pertaining to intellectual property and despite the fact that intellectual property is not explicitly mentioned in the property clause.

⁶⁵ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106.

law recognition of intellectual property and comparative law examples supporting the constitutional protection of intellectual property. The first argument, according to Dean,⁶⁶ relates to the supposed reason why the state grants protection to intellectual property, which is to provide an incentive. This is done by rewarding inventors, designers and authors for sharing their creations that may benefit the public. The idea behind this approach is that the state enters into an agreement with creators that they receive a temporary monopoly to exploit their creation. Once this term expires, the creation falls into the public domain where it is open for all to use. Dean⁶⁷ argues that this approach has proven to be successful in the past century and has to a great extent promoted the expansion of the development of creative works.⁶⁸

The second argument noted by Dean⁶⁹ is that the intellectual property system is universally recognised and as such is internationally regulated by international treaties. In particular, he notes the Paris Convention on Intellectual Property of 1883,⁷⁰ the Berne Convention on Copyright of 1886⁷¹ and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of 1994.⁷² South Africa is a signatory to these treaties. According to Dean,⁷³ this means that South Africa is internationally bound to provide protection for intellectual property that is in line with ‘internationally accepted norms and standards’ and also to provide intellectual property protection to other signatory states. Protection for intellectual property, Dean argues, is a non-negotiable requirement for foreign investment and the inflow of technology from countries that invest. Dean⁷⁴ argues that this may be achieved by

⁶⁶ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 106.

⁶⁷ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 106.

⁶⁸ See Chap 4 (The Value of Immaterial Property) for a full discussion of the theoretical justifications for the protection of intellectual property, namely the labour theory, reward theory, incentive theory, spiritual theories, economic theory, theory of natural monopoly and arguments based on the intellectual property commons or the so-called public domain.

⁶⁹ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 106.

⁷⁰ World Intellectual Property Organisation *Paris Convention for the Protection of Industrial Property* (March 10, 1883) (http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (accessed 17 September 2009)).

⁷¹ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (September 9, 1886) (http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (accessed 17 September 2009)).

⁷² World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/lea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

⁷³ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 106.

⁷⁴ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 106.

protecting the right to hold intellectual property in the Bill of Rights. He argues that by entrenching this right, the incentive created by the intellectual property system would be strengthened considerably. Dean⁷⁵ refers to the Constitution of the United States of America as an example to support his final argument that foreign law also points in the direction that intellectual property ought to be constitutionally protected. He states that the United States of America is the most successful industrial country and accordingly their model for intellectual property should be followed.

Dean⁷⁶ acknowledged that the Constitutional Assembly did not disagree with the arguments why intellectual property should be constitutionally protected, but they reasoned that intellectual property interests could be adequately protected under the general property clause. He states that this reasoning was based on the idea that intellectual property is a form of property and that general protection afforded to property would also adequately cover intellectual property. Dean⁷⁷ does not agree with this line of reasoning. He states that once the debate about the Bill of Rights moved from the Constitutional Assembly to the Constitutional Court, the persons advocating separate protection for intellectual property focused on the Second Principle⁷⁸ of the 34 Constitutional Principles set out in Schedule 4 of the interim Constitution of the Republic of South Africa 200 of 1993. The persons advocating the separate protection of intellectual property attempted to establish that intellectual property is an independent, universally accepted fundamental human right that should be entrenched in a justiciable provision in the Constitution. They attempted to prove three statements in applying the Second Constitutional Principle to intellectual property. In the first instance, they argued that intellectual property rights are fundamental rights or freedoms. Secondly, they attempted to establish that intellectual property rights are universally accepted as fundamental rights. Finally, they stated that there are no provisions in the Bill of Rights⁷⁹ that

⁷⁵ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 107.

⁷⁶ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 107.

⁷⁷ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 107.

⁷⁸ Principle II of the 34 Constitutional Principles: ‘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.’

⁷⁹ In the Constitution of the Republic of South Africa 1996.

are entrenched or justiciable provisions protecting intellectual property rights; and more specifically that the property clause does not adequately protect intellectual property rights.⁸⁰

Regarding the first argument, that the right to hold intellectual property is an independent fundamental right or freedom, Dean⁸¹ states that this argument was founded on two bases. These were the natural law principle and the United Nations Bill of Rights⁸² respectively. According to Dean,⁸³ the natural law principle has played a great role in the process for the recognition of intellectual property rights.⁸⁴ The second argument, which is more important for the purposes of this chapter, pertains to intellectual property rights under the United Nations Bill of Rights.⁸⁵ Dean argues that these covenants are international treaties that convert the provisions in the Universal Declaration of Human Rights (UDHR)⁸⁶ into enforceable international obligations. This does not necessarily mean that intellectual property rights must be protected in a separate constitutional clause. On the contrary, signatory states are allowed a wide margin of freedom in implementing protection for fundamental rights. Protecting intellectual property could entail that the state provides private law protection for intellectual property rights and that the right is guaranteed by the property clause of the particular state's Constitution. In this way, a state could still comply with international law.

Dean's⁸⁷ article on constitutional intellectual property protection discusses the independent intellectual property clause that the Association of Marketers proposed for the Bill of Rights

⁸⁰ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 107.

⁸¹ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 107-108.

⁸² This United Nations Bill of Rights comprises the Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights of 1966; and the International Covenant on Economic, Social and Cultural Rights of 1996.

⁸³ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 108.

⁸⁴ See Mostert F 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property: A historical survey from Roman law to modern-day law' (1987) 104 *SALJ* 480-501 at 480. Also see Chap 4 (The Value of Immaterial Property) sec 4.2 on the labour theory (the natural-law theory) for a full explanation of this principle.

⁸⁵ This comprises the Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights of 1966; and the International Covenant on Economic, Social and Cultural Rights of 1966.

⁸⁶ United Nations Universal Declaration of Human Rights (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁸⁷ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 114-115.

during the proceedings of the *First Certification* case.⁸⁸ This proposed clause reads as follows:

‘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 from which they are the proprietors.’

As Dean⁸⁹ notes, this proposed clause is based on the content of article 27(1) of the Universal Declaration of Human Rights.⁹⁰ He also points out that this proposed clause adds the word ‘industrial’ and lists ‘brand equity’ as a further sub-category of intellectual property. This issue is now moot, since the Constitutional Court⁹¹ decided that there is no entitlement to a separate right for the protection of intellectual property and all forms of property may be adequately protected by the constitutional property clause.

According to Dean,⁹² South Africa has a very good track record in the field of intellectual property and there is no reason that he can find why the universally accepted fundamental right to hold intellectual property should be omitted from the South African Bill of Rights. He states that such an enshrinement of intellectual property rights would in fact 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’.⁹³ Dean states that one could argue that intellectual property rights may conflict with certain other fundamental rights, such as the right to freedom of expression. He states that intellectual property rights are monopolistic by their very nature, since they grant exclusive rights and that such exclusivity must necessarily impact the rights of others to some extent. Furthermore, where two conflicting rights have to be considered in the application of section 36 of the Constitution, Dean⁹⁴ submits that the right that is not entrenched within the Constitution may be considered subservient to the other right. He argues that such a situation

⁸⁸ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

⁸⁹ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 114.

⁹⁰ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁹¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

⁹² Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 114-115.

⁹³ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 115.

⁹⁴ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 115.

could be avoided if intellectual property rights were to be given explicit constitutional protection. It has to be noted here that even where both rights are entrenched in the Constitution, one of the rights could still be considered subservient to the other right since not all constitutional rights enjoy equal protection. Some rights such as the right to life, political rights and socio-economic rights are non-derogable, while other rights such as the right to property may be infringed in certain instances.

In discussing the view of the Constitutional Assembly and the Constitutional Court in the *First Certification* case⁹⁵ that intellectual property rights are protected by the constitutional property clause, Dean⁹⁶ mentions that the Association of Marketers argued that the property clause does not grant adequate protection to intellectual property rights. The Constitutional Court did not enquire into the question of whether intellectual property is a separate or independent category of property. Dean⁹⁷ states that intellectual property rights are clearly distinguished from property rights in a human rights context. According to him, intellectual property rights are not considered to be a sub-category of property rights. In order to demonstrate this submission, Dean⁹⁸ refers to article 17 and 27(2) of the UDHR.⁹⁹ Article 17 of the UDHR deals with property rights and is classified under the political and civil rights; while article 27(2) deals with intellectual property rights and falls under the section for economic, social and cultural rights.

Dean¹⁰⁰ also states that property rights are entrenched in the International Covenant on Civil and Political Rights,¹⁰¹ but intellectual property rights, on the other hand are protected in the International Covenant on Economic, Social and Cultural Rights.¹⁰² Furthermore, Van der

⁹⁵ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

⁹⁶ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 112.

⁹⁷ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 112.

⁹⁸ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 112.

⁹⁹ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁰⁰ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 112.

¹⁰¹ United Nations *International Covenant on Civil and Political Rights* (Dec 16, 1966) 999 UNTS 171 (1976), entered into force Mar 23, 1976 (<http://www2.ohchr.org/english/law/ccpr.htm> (accessed 17 September 2009)). See Chap 6 (Immaterial Property Interests in International Law), especially sec 6.1 and sec 6.3.

¹⁰² United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

Walt¹⁰³ views Dean's approach as a logical error, since it cannot be concluded that the rights are inherently different merely because they are protected under separate international law instruments; there may be strategic or institutional reasons for that in international law. Van der Walt¹⁰⁴ also notes that if Dean's argument were to be accepted, this would have the result that other property rights created and protected by special national legislation would also require separate provisions. This would include mineral rights, sectional title and registered real security rights governed by legislation. The source of origin and protection cannot determine that the right is so unique that it requires separate protection. Constitutional law merely requires that private law, including legislation, recognises the right and affords protection once the right is vested in terms of normal law; and then constitutional protection is available to the particular property interest. Dean's analysis would specifically exclude all land rights created by land reform legislation¹⁰⁵ from section 25, because those rights are also only created by the legislation, which is the object of Dean's concerns.¹⁰⁶

Dean¹⁰⁷ explains that the constitutional property clause (article 25 of the Constitution) is based on the premise that property is pre-existing and it is merely its ownership that is to be regulated. Van der Walt¹⁰⁸ states that this conclusion that the Constitution only protects pre-existing property is false, since the property clause clearly includes rights that cannot be described as pre-constitutional or pre-existing, for example servitudes yet to be created; cars yet to be designed and built; licences yet to be granted; and companies yet to be set up. According to Dean,¹⁰⁹ the focus of the property clause falls on the title of the property and not the creation of the property. By contrast, the law of intellectual property principally caters for the creation of property and the regulation of ownership is less important. The question of

Dean's statement is incorrect, since the right to property was not made binding in any covenant. Although there were extended discussions about a possible formulation of the right to property for the purposes of an international covenant, no agreement could be reached between state parties to the UDHR and subsequently the right to property was excluded. The right to intellectual property in the ICESCR is viewed as an exception. International law is discussed in more detail in Chap 6 (Immaterial Property Interests under International Law).

¹⁰³ See Van der Walt AJ *Constitutional Property Clauses* (1999) 352-353.

¹⁰⁴ See Van der Walt AJ *Constitutional Property Clauses* (1999) 352-353 and Van der Walt AJ *Constitutional Property Law* (2005) 95.

¹⁰⁵ For example, see the Restitution of Land Rights Act 22 of 1994.

¹⁰⁶ See Van der Walt AJ *Constitutional Property Clauses* (1999) 328-329 and Van der Walt AJ *Constitutional Property Law* (2005) 284-398 in general.

¹⁰⁷ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 112-113.

¹⁰⁸ See Van der Walt AJ *Constitutional Property Clauses* (1999) 323-324, 349-353 and Van der Walt AJ *Constitutional Property Law* (2005) 85-86, 95.

¹⁰⁹ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 112-113.

ownership only becomes relevant once the property actually comes into existence. Dean explains the position as follows:

‘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) over which he can thereafter exert powers of ownership.’¹¹⁰

From this remark it appears that the purpose of constitutional protection according to Dean should be recognition in order to establish and justify the rights; and that is not the purpose of the constitutional provision. Constitutional property clearly only grants actual protection to specific rights already recognised and vested according to private law or statute.

Dean¹¹¹ notes that the content of the ownership of intellectual property depends on the law that creates it. In fact, the object of an intellectual property right is created and determined by law. He notes that all forms of intellectual property are created by statute, subject to the common-law remedy of passing off. If the right to hold intellectual property is not entrenched in the Constitution, the state would have the power to end the very existence of intellectual property if they chose to do so. In order to demonstrate this position, Dean contrasts intellectual property with land, which is a form of corporeal property. He states that land does not exist because of any particular statute and as such parliament can go no further than to regulate its ownership. Dean¹¹² draws the conclusion that completely different considerations are applicable in the case of the entrenchment of the constitutional rights to property and intellectual property respectively.¹¹³ This incorrect conclusion is not drawn from the best example, since section 25(4) (b) states explicitly that property is not limited to land. Therefore this example logically applies only to one kind of the property categories included under section 25. One has to note that there are many other forms of property included under section 25 that are not pre-existing such as land. At least some of the property interests included under the property clause are also created by legislation. Some examples would be real security rights and shares. With this in mind, the conclusion drawn by Dean does not

¹¹⁰ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 113.

¹¹¹ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 113.

¹¹² Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 113.

¹¹³ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 113.

seem accurate, since the constitutional property clause is wide enough to include different forms of property for constitutional protection. The mere fact that a specific type of property is created by legislation does not mean that it needs a different kind of protection than that which the property clause can afford.

Dean adopts a different approach here in stating that the state would have the ability to abolish the institution of intellectual property if it were not entrenched as a constitutional right. The crux of Dean's argument is that he wants to insulate statutorily created rights against state regulation or abolition, and that cannot be done by constitutional protection. This may be compared to the position regarding for example licences and the so-called new property, where the same problem exists. In German law, the solution to this problem in the context of new property or social-security rights is that if the statute creates a right in such a way that it vests in someone and if the beneficiary acquires it on the basis of some own effort or investment (*Eigensleistung* requirement), the fact that the right is created by statute does not render it completely at the arbitrary disposition of the legislature. A contribution-based pension would fall in this category. However, if the right is a purely statutory grant, constitutional recognition as property will not protect it against statutory abolition without recourse.

Dean¹¹⁴ stresses the importance of the fact that intellectual property consists of both moral and material interests.¹¹⁵ He concedes that intellectual property rights may be seen as analogous to property law to the extent that it creates economic rights or so-called material interests. However, the moral rights that may be compared to personality rights are also created by intellectual property law. Dean¹¹⁶ mentions the provision for moral rights in section 20 of the Copyright Act 98 of 1978 by way of example. This provision gives an author the right to claim authorship of a work even in the case where copyright has been transferred. The author may also object to a 'distortion, mutilation or other modification of the work'¹¹⁷ where this may influence the author's reputation negatively.

¹¹⁴ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 113.

¹¹⁵ This is stated in article 27(2) of the United Nations Universal Declaration of Human Rights (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹¹⁶ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 113.

¹¹⁷ Sec 20 of the Copyright Act 98 of 1978.

Dean¹¹⁸ argues that section 25 of the Constitution does not cater for these moral rights, which are recognised explicitly in the Universal Declaration of Human Rights. This is not entirely true, since it would be harder for the state to justify the deprivation or expropriation of a property right that is closer to the personality of the owner.¹¹⁹ He also argues that the issues of expropriation and restoration of dispossessed property that section 25 deals with has no relevance for intellectual property. He claims that if these aspects were to be applied to intellectual property it would

‘abrogate the very underlying principles and theory of [intellectual property] ... In practical terms, section 25 has no bearing whatsoever on [intellectual property] as a fundamental right or in the regulation of its content or ownership.’¹²⁰

This conclusion is once again drawn from selective examples. While it is correct that the restoration of dispossessed property would not be relevant for intellectual property, the same may also be said of licences, personal servitudes, the right to lateral support and many other forms of property that are included and protected under the constitutional property concept. And although it is unlikely that expropriation would be relevant to intellectual property, the same is true for about 90 percent of all property. The main constitutional issue that affects about all forms of property is deprivation in terms of section 25(1), especially in instances where the state wishes to regulate property; and intellectual property is absolutely included in this issue.

Dean¹²¹ proposes what he describes as a straightforward test in order to determine whether the constitutional property clause entrenches intellectual property rights adequately. He submits that one should ask whether the clause would prohibit parliament from passing a

¹¹⁸ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 113.

¹¹⁹ See Chap 4 (The Value of Immaterial Property) and specifically sec 4.5 dealing with spiritual theories and the personality theory in particular.

¹²⁰ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 113. Compare Van der Walt AJ *Constitutional Property Law* (2005) 82; Alexander GS *The Global Debate Over Constitutional Property* (2006) 163; Roux T & Davis D ‘Property’ in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17 and Roux T ‘Property’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-15. All of these authors agree that there is scope in the constitutional property clause to include intellectual property as constitutional property and that it would constitute adequate protection.

¹²¹ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 114.

statute that prevents further intellectual property rights from being created. Dean¹²² is of the opinion that the answer to that question is decidedly in the negative. It is respectfully submitted that the answer to that question is not quite as straightforward.¹²³ The same argument holds for licences (for example in taxi's), shares in certain kinds of companies, servitudes with regard to water and many other property interests. Parliament would only be prohibited from passing a statute that prevented new intellectual creations from receiving property protection if this constitutes an unjustifiable arbitrary deprivation or an expropriation without just compensation.

5 2 5 **Deprivation and Expropriation**

Dean's 'straightforward' question needs to be answered by reference to expropriation and deprivation, since no form of property receives absolute protection from state interference.

Section 25 of the Constitution reads as follows:

'(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property'

(c) the market value of the property;

(d) *the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property*; and [my emphasis]

(e) the purpose of the expropriation.

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) *property is not limited to land* [my emphasis]

¹²² Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 114.

¹²³ See sec 5.3.2 of this chapter for specific examples from German constitutional law that deal with intellectual property.

(5) [...]

(6) [...]

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) [...]

(9) [...]¹²⁴

Of particular relevance to Dean's¹²⁵ argument that section 25 would not prevent parliament from passing a statute that would bring an end to the further creation of intellectual property rights, are the sections pertaining to deprivation¹²⁶ and expropriation¹²⁷ respectively. A situation as envisioned by Dean¹²⁸ could possibly either fall into the category of deprivation; expropriation; or arbitrary deprivation, in which case it would be unconstitutional. It has to be noted that section 25(4) (b) expressly states that property is not limited to land. Van der Walt reasons that this section may be used to make the argument 'that movable corporeal property as well as intangibles such as commercial interests and intellectual property [are] included under the protection in section 25 as a matter of course.'¹²⁹ As a result, if intellectual property is included under section 25, as is submitted, then any Act passed by the legislature that takes away any property or a specific category of property would either be a valid and constitutionally legitimate deprivation or expropriation or it would be unconstitutional and as such the Constitutional Court could strike down the particular Act for being invalid. For example, a legislative amendment may take away the right to remuneration for a work of copyright for specific uses such as educational purposes.¹³⁰ It becomes clear that the constitutional property clause does not necessarily leave intellectual property and other immaterial property interests without constitutional protection. However, this does not mean that constitutional protection is unlimited. Since intellectual property rights are created by statute, they could also potentially be extinguished by an act of parliament or by administrative action in terms of legislation.

¹²⁴ For the sake of brevity and clarity I have omitted sections that pertain only to land and highlighted sections that may be of particular relevance to intellectual property and the broader category of immaterial property.

¹²⁵ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 114.

¹²⁶ Sec 25(1) of the Constitution of the Republic of South Africa 1996.

¹²⁷ Sec 25(2) - 25(4) of the Constitution of the Republic of South Africa 1996.

¹²⁸ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 114.

¹²⁹ Van der Walt AJ *Constitutional Property Law* (2005) 15.

¹³⁰ See *BVerfGE* 31, 229 [1971] (*Urheberrecht* case) (the Schoolbook case).

The purpose of the section pertaining to deprivation is twofold.¹³¹ In the first instance it verifies that the property clause does not give absolute protection to property by confirming ‘the constitutional police power principle’ that allows for state interferences with property interests, provided that the interference complies with the requirements in section 25(1). Secondly, this section ensures that such regulations by the state comply with constitutional requirements. This section requires that a balance be struck between the protection of individual rights and the promotion of social responsibilities. Expropriation as set out in section 25(2) and 25(3), by contrast, does not pertain to regulations that merely interfere with certain property interests, but to instances where the property is taken by the state and compensation is required. These sections set out the requirements that the state needs to satisfy in order for such an expropriation to be valid and they also provide guidelines to determine what compensation would be just and equitable.¹³²

5 2 6 The *FNB* Case

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*¹³³ (hereafter referred to as the *FNB* case), the Constitutional Court set down certain steps that need to be followed where a court needs to consider the validity of limitations on property rights. These steps were based on the court’s distinction between deprivation and expropriation. The court defined deprivation as the wider category that includes the narrower category of expropriation, so that something that is a deprivation may also be an expropriation in certain instances. The court’s argument was that the requirements for deprivation are also applicable in the instance of an expropriation. Accordingly, for an expropriation to be valid the requirements in section 25(1) pertaining to deprivation as well as section 25(2) requirements for expropriation need to be satisfied, otherwise such an expropriation would be unconstitutional.

In the *FNB* case,¹³⁴ the Constitutional Court set out the methodology to be followed in a constitutional property dispute. The first step is to determine whether there was a deprivation

¹³¹ See Van der Walt AJ *Constitutional Property Law* (2005) 13.

¹³² See Van der Walt AJ *Constitutional Property Law* (2005) 14.

¹³³ 2002 (4) SA 768 (CC).

¹³⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 58-60.

that infringes property in conflict with section 25(1) and therefore arbitrarily. This first step is referred to as the arbitrariness test. The questions whether the applicant qualifies as a beneficiary; whether the interest affected is in fact property for purposes of section 25; and whether the property interest was actually infringed upon appear to be ‘sucked into’ the arbitrariness test.¹³⁵ In the *FNB* case, the Court set out the arbitrariness test as follows:

‘[D]eprivation of property is “arbitrary” as meant by s[ection] 25 when the “law” referred to in s[ection] 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.’¹³⁶

Roux¹³⁷ argues that the Court’s test for arbitrariness would be the focus of basically any property clause enquiry since the test would apply to all deprivations, including expropriations.

Once it has been determined in the first step that there had in fact been an arbitrary deprivation, the second step would be to determine if such a deprivation may still be justified under section 36(1). If it cannot be justified, then the enquiry ends at this step since the limitation is unconstitutional. If the deprivation is in line with section 25(1) and therefore not arbitrary, then the enquiry proceeds to the question whether the deprivation is also an expropriation. If the deprivation is in conflict with section 25(1) but may be justified under section 36(1), then it must furthermore be determined whether the deprivation is also an expropriation, which is the third step in the enquiry. If the deprivation was indeed also an expropriation, then it must meet the requirements as set out in section 25(2) and 25(3).¹³⁸ If it

¹³⁵ See Roux T ‘Property’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-2 – 46-5, 46-21 – 46-25 for a full argument on this aspect of the ‘arbitrariness vortex’, as he termed it. Also see Van der Walt AJ *Constitutional Property Law* (2005) 54.

¹³⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 100.

¹³⁷ Roux T ‘Property’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-23 – 46-25.

¹³⁸ Sec 25(2) and (3) of the Constitution provide as follows:

‘(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property’

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.’

does conform to section 25(2) and 25(3) requirements, then the expropriation is constitutional and that is the end of the enquiry. However, if the deprivation did amount to an expropriation but the requirements in section 25(2) and 25(3) were not met, then it could still be justified under section 36(1). If it may be justified, then the expropriation is constitutional; but if it is also not justifiable under section 36(1) then the expropriation is unconstitutional.

Van der Walt¹³⁹ notes that this procedure is not as effective as it appears. He points out two important reasons why it is not likely that an enquiry into constitutional validity would advance through all the stages as set out by the court. The first reason pertains to the likelihood that non-compliance with the requirements for a valid expropriation would already become apparent during the test for arbitrariness as set out in section 25(1). Where an expropriation does not make provision for compensation, it would already fail the non-arbitrariness test even before it has reached the stage where the deprivation is considered as an expropriation. As such it is unlikely that the analysis would ever reach the expropriation stage. The second reason why the enquiry is unlikely to reach all the stages is because logically a deprivation cannot be justified under section 36(1) if it has failed the non-arbitrariness test. As submitted by Van der Walt,¹⁴⁰ it would be only in the most unusual cases that section 36(1) would play any role in a constitutional property dispute. If these reasons are valid, as they appear to be, then it is very likely that in most constitutional property disputes the enquiry would never proceed beyond the non-arbitrariness test. The enquiry would get stuck in the ‘arbitrariness vortex’, as Roux¹⁴¹ termed this particular complication with the approach as set out by the Court in the *FNB* case.¹⁴²

In the *FNB* case,¹⁴³ the Constitutional Court did not find it necessary to decide whether the property was property for purposes of the constitutional property clause, since the property in question was movable corporeal property. As the court stated:

‘Here it is sufficient to hold that ownership of a corporeal movable must - as must ownership of land - lie at the heart of our constitutional concept of property, both as regards the nature of

¹³⁹ Van der Walt AJ *Constitutional Property Law* (2005) 54-55.

¹⁴⁰ Van der Walt AJ *Constitutional Property Law* (2005) 55.

¹⁴¹ Roux T ‘Property’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-2 – 46-5, 46-21 – 46-25.

¹⁴² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 58-60.

¹⁴³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 51.

the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of s[ection] 25.¹⁴⁴

The court also found it ‘practically impossible to furnish - and judicially unwise to attempt - a comprehensive definition of property for purposes of s[ection] 25’.¹⁴⁵ The court specifically stated that they were ‘not concerned at all with incorporeal property’.¹⁴⁶ Roux,¹⁴⁷ however, states that there was nothing in the judgment to suggest that the court would not grant constitutional property protection to incorporeal property if it were faced with such a case. Since many forms of incorporeal property interests are not accepted as property in private law and also not yet explicitly as constitutional property, it becomes clear that the property question may still be very relevant in the context of immaterial property interests.¹⁴⁸ Accordingly it would not always be possible to merely brush over the property question and continue to the non-arbitrariness test. Depending on the kind of property, the court may very well have to go into the issue whether the allegedly infringed interest is indeed property for purposes of section 25.

Since intellectual property rights and some unconventional immaterial property interests are often held by a company or other juristic person, it should be noted here that in principle a juristic person would be entitled to the protection of section 25 of the 1996 Constitution. Van der Walt¹⁴⁹ notes this by reference to section 8(4) of the 1996 Constitution which entitles juristic persons to the protection of the rights as protected by the Bill of Rights ‘to the extent required by the nature of that juristic person’. In the *FNB* case,¹⁵⁰ the Constitutional Court confirmed the principle that not only natural persons, but also juristic persons may be the beneficiaries of section 25 protection.¹⁵¹ It becomes apparent that the constitutional property

¹⁴⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 51.

¹⁴⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 51.

¹⁴⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 100.

¹⁴⁷ Roux T ‘Property’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-10.

¹⁴⁸ See Chaps 2 (Traditional Immaterial Property Interests) and 3 (Unconventional Immaterial Property Interests) for a discussion of the different immaterial property interests.

¹⁴⁹ Van der Walt AJ *Constitutional Property Law* (2005) 49. Also see Roux T ‘Property’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-9, where he states that a company or other juristic person should enjoy constitutional protection over their property even where their headquarters are situated somewhere other than South Africa.

¹⁵⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

¹⁵¹ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 41-45 for the reasons

clause may indeed offer protection to intellectual property just like any other form of property. Similarly, the constitutional property clause could also restrict intellectual property just like any other form of property.

5 2 7 The *Laugh It Off* Cases

The position at this stage is that intellectual property rights are not entrenched in a separate constitutional clause. The best solution is hence to protect intellectual property rights and other immaterial property interests under the general constitutional property clause, which provides adequate protection. The situation in terms of which intellectual property rights and a fundamental right come into conflict as foreseen by Dean¹⁵² did in fact culminate in a court case where the right to freedom of expression had to be weighed up against the right of a trademark owner. In *South African Breweries International (Finance) BV t/a Sabmark International v Laugh It Off Promotions CC*¹⁵³ the court had to weigh up the constitutionally protected right to freedom of expression and the property right of a trademark owner. The applicant, South African Breweries (SAB), had a registered trademark for the words ‘Carling Black Label’ and for a representation of the label of its product. The respondent, Laugh It Off Promotions CC (Laugh It Off), sold T-shirts with the slogan ‘Black Labour, White Guilt.’ The laudatory part ‘America's lusty, lively beer’ and ‘Brewed in South Africa’ were replaced by ‘Africa's lusty, lively exploitation since 1652’ and ‘No regard given worldwide’. The marks used by Laugh It Off appeared the same as SAB’s registered trademarks. SAB brought an action in terms of section 34(1) (c) of the Trade Marks Act 194 of 1993, which prohibits the use of a well-known mark where use would be detrimental to or take unfair advantage of the distinctive character or repute of a mark. The court found in favour of SAB and Laugh It Off subsequently lodged an appeal against the court’s finding of trademark infringement. As Smith¹⁵⁴ notes, Laugh It Off had been given leave to appeal directly to the Supreme Court of Appeal due to the novelty of the issues.

why the Court decided to grant constitutional property protection to juristic persons. In brief, the two reasons were that only when protection was extended to juristic persons as well could the rights of natural persons be fully realised; and that if juristic persons were not protected, disruptions would occur and the fabric of the democratic state would be undermined. See Van der Walt AJ *Constitutional Property Law* (2005) 49.

¹⁵² Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 115.

¹⁵³[2003] 2 All SA 454 (C) par 16. See Smith A ‘Trade-mark dilution: You can’t laugh it off’ (2004) 12(4) *JBL* 196-200 at 196-197 for an extensive discussion of the case. See further Alberts W ‘A case of Black Label: More than just free speech’ (2003) July *De Rebus* 32-35 at 32-33 for commentary on the ruling of the court.

¹⁵⁴ Smith A ‘Trade-mark dilution: You can’t laugh it off’ (2004) 12(4) *JBL* 196-200 at 197.

When the case went on appeal,¹⁵⁵ the Supreme Court of Appeal stated that the Trade Marks Act 194 of 1993 should not infringe freedom of expression unduly. The court dismissed the appeal after weighing up the right to freedom of expression against the right to property and freedom of trade. The court's decision was based on their finding that Laugh It Off's use of SAB's trademark could not be justified in terms of freedom of expression, because there were means other than the sale of T-shirts available for Laugh It Off to convey their message. According to Smith, the court's judgment is 'notable for its extensive use of [foreign] case law'.¹⁵⁶ After this decision, Laugh It Off appealed to the Constitutional Court,¹⁵⁷ where the Supreme Court of Appeal's decision was ultimately reversed. The Constitutional Court held that the right to freedom of speech and to use material in a parody were merely factors to be considered in determining whether the prejudice suffered by the holder of a right (in this case SAB, the holder of a trademark) and were not defences *per se*. Of specific importance to this chapter is the fact that Sachs J balanced the right to freedom of expression and the right to property.¹⁵⁸

The Constitutional Court argued as follows regarding the balancing of the right to freedom of expression and the property right of the trademark owner:

'The question to be asked is whether, looking at the facts as a whole, and analysing them in their specific context, an independent observer who is sensitive to both the free speech values of the Constitution and the *property protection objectives of trademark law*, [my emphasis] would say that the harm done by the parody to the property interests of the trademark owner outweighs the free speech interests involved ... It seems to me that what is in issue is not the limitation of a right, but the balancing of competing rights ... it would appear once all the relevant facts are established, it should not make any difference in principle whether the case is seen as a property rights limitation on free speech, or a free speech limitation on property rights. At the end of the day this will be an area where nuanced and proportionate balancing in

¹⁵⁵ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) par 29-34. See Neethling J & Potgieter JM 'Disparagement of a business, its product or its services: Freedom of expression of consumers and the public' (2005) 26 *Obiter* 389-397 at 395-396 for a brief discussion of the case. Also see Smith A 'Trade-mark dilution: You can't laugh it off' (2004) 12(4) *JBL* 196-200 at 197-199 for a full discussion of the technical aspects of the case and Ginsburg P 'Intellectual property law' 2005 *ASSAL* 572-583 at 573 for a very concise account of the facts and issues of the case.

¹⁵⁶ Smith A 'Trade-mark dilution: You can't laugh it off' (2004) 12(4) *JBL* 196-200 at 197.

¹⁵⁷ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁵⁸ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) par 82-83.

a context - specific and fact - sensitive character will be decisive, and not formal classification based on bright lines.¹⁵⁹

After these court decisions, different opinions were voiced as to the impact of the first two decisions as well as the final decision of the Constitutional Court on the status of trademarks and the broader category of intellectual property under the Constitution. Pistorius¹⁶⁰ discussed the implications of *South African Breweries International (Finance) BV t/a Sabmark International v Laugh It Off Promotions CC*¹⁶¹ after the case had gone on appeal to the Supreme Court of Appeal, but before the Constitutional Court decision. She states that '[t]he constitutional right of freedom of expression is not absolute but is limited by laws of general application such as intellectual property laws'.¹⁶² This statement is derived from section 36(1) of the Constitution and interpreted to mean that a person's right to freedom of expression may be limited in certain instances where it is in conflict with someone else's right to a trademark. As the court stated per Harms J in *Laugh It Off v SAB International*:

'Concern is expressed from time to time about the pervasiveness of trademarks, the fact that trademark owners tend to be voracious and that trademark protection is not always kept within its legitimate bounds ... On the other hand, and in spite of some judicial resistance in certain quarters, trademarks are property, albeit intangible or incorporeal. The fact that property is intangible does not make it of a lower order. Our law has always recognised incorporeals as a class of things in spite of theoretical objections thereto ... But then again, *intellectual property rights have no special status. The Constitution does not accord them special protection and they are not immune to constitutional challenge* [my emphasis]. Even if constitutional, their enforcement must be constitutionally justifiable. The problem, as will appear later, is that the question of how far guarantees of freedom of the media and expression affect intellectual property rights, is, except for the USA, somewhat virgin territory.'¹⁶³

From the court's statements there are a few aspects that are of importance for this chapter. In the first instance, the court explicitly affirms that intangible property is property in private

¹⁵⁹ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) par 82-83.

¹⁶⁰ Pistorius T 'Trade-mark tarnishment: Should we laugh it off all the way to Telcomsucks and Hellcom?' (2004) 16 SA Merc LJ 727-740 at 729.

¹⁶¹ [2003] 2 All SA 454 (C) par 16.

¹⁶² Pistorius T 'Trade-mark tarnishment: Should we laugh it off all the way to Telcomsucks and Hellcom?' (2004) 16 SA Merc LJ 727-740 at 729.

¹⁶³ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) paras 8, 10-11. For a short discussion of the court's remarks, see Pistorius T 'Trade-mark tarnishment: Should we laugh it off all the way to Telcomsucks and Hellcom?' (2004) 16 SA Merc LJ 727-740 at 731.

law, which substantiates the argument that at least certain immaterial property interests should be accepted as constitutional property. Smith¹⁶⁴ points out the statement of Harms J that ‘no one would suggest that painting graffiti on private property is not an abuse of free speech’¹⁶⁵ and notes that Harms J does not think that it should be any different for trademarks. Furthermore, the court states that intellectual property has no special status and consequently rejects the idea that intellectual property rights should enjoy separate constitutional protection. The court also confirms that intellectual property rights, exactly like other property rights, are not absolute. Finally, the court weighs up intellectual property and freedom of expression, which implicitly gives acknowledgement to intellectual property even though the court does not expressly refer to the constitutional property clause. The reason for this omission must be that the issue of constitutional property protection was not placed before the court for consideration.

On the topics that become apparent from the judgment, Smith’s¹⁶⁶ conclusion is that a South African trademark should be seen as property and the owner of such property may protect it like any other form of property. He states that a trademark may not be freely taken and distorted for commercial gain. Whether a certain use of a trademark is allowed depends on whether or not the prejudice to the owner of the trademark weighs more than the right to freedom of expression. There are certain instances where a trademark may be used for a parody where the use of the trademark is not strictly for commercial gain. Smith submits that such an instance may occur where the parody is ‘based on truth, public interest, and fair comment for comic effect, or to ridicule, criticize, or comment on the trademark or its proprietor’.¹⁶⁷ Smith’s article was also written before the Constitutional Court’s judgment on the case; hence the position is slightly different pertaining to the aspect of commercial gain. The comments that a trademark may be protected in terms of the Constitution like any other form of property is still relevant even after the Constitutional Court overturned the Supreme Court of Appeal’s decision.

¹⁶⁴ Smith A ‘Trade-mark dilution: You can’t laugh it off’ (2004) 12(4) *JBL* 196-200 at 198-199.

¹⁶⁵ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) par 31.

¹⁶⁶ Smith A ‘Trade-mark dilution: You can’t laugh it off’ (2004) 12(4) *JBL* 196-200 at 199-200.

¹⁶⁷ Smith A ‘Trade-mark dilution: You can’t laugh it off’ (2004) 12(4) *JBL* 196-200 at 200.

After the Constitutional Court gave judgment in *Laugh It Off v SAB International*,¹⁶⁸ there were also a few comments written on the decision. Alberts¹⁶⁹ begins his discussion by referring to the process followed by the Constitutional Court. The Constitutional Court criticised the two-step approach that the Supreme Court of Appeal had followed in dealing with the relationship between the Trade Marks Act 194 of 1993 and the 1996 Constitution. The process followed by the Supreme Court of Appeal had been to first determine whether there was an infringement on the trademark and thereafter considering whether such an infringement could be constitutionally justified. According to the Constitutional Court, this approach is flawed and the correct approach would be to base a finding of likely detriment on whether the expression is protected under section 16(1) of the Constitution, the right to freedom of expression clause. If the expression is found to be protected, then the alleged detriment must be ‘mediated against the competing claim for free expression’.¹⁷⁰ According to the Constitutional Court, the Supreme Court of Appeal’s approach did not allow that court to take into account the alleged infringer’s claim to the right to freedom of expression.¹⁷¹ The Constitutional Court also noted that statutes should be construed consistent with the Constitution, consequently section 34(1) (c) of the Trade Marks Act 194 of 1993 had to be interpreted bearing in mind the right to freedom of expression protected under section 16 of the Constitution.

Alberts argues that this procedure proposed by the Constitutional Court seems somewhat circular, but concedes that it is most likely less so if one takes into account that ‘an expression will usually qualify for constitutional protection’.¹⁷² He derives this conclusion from the court’s statement that an expression would be protected unless it is excluded by section 16(2), which deals with propaganda for war; incitement of violence; and hate speech inciting harm.¹⁷³ Alberts notes that the threshold for protection of an expression is

¹⁶⁸ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁶⁹ Alberts W ‘The future of trade mark dilution in South Africa: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and the Freedom of Expression Institute* [2005] 3 BCLR 743 (CC)’ (2006) 1 TSAR 212-223 at 213.

¹⁷⁰ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) par 43-44.

¹⁷¹ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) par 44.

¹⁷² Alberts W ‘The future of trade mark dilution in South Africa: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and the Freedom of Expression Institute* [2005] 3 BCLR 743 (CC)’ 2006 TSAR 212-223 at 213.

¹⁷³ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) par 47.

accordingly not high and no specific qualities are required. He argues that constitutional protection may feature twice in the process of reaching a decision; the first being merely to include an expression under the protection of the right to freedom of expression and the second the actual weighing up of the competing rights in order to determine which one will dominate. Furthermore, he also notes that the Constitutional Court's approach seems to be that in cases where the right to freedom of expression is found to prevail, no 'detriment' in the legal sense exists.¹⁷⁴

Ginsburg,¹⁷⁵ who is also cited as council for SAB in the court *a quo*, wrote the intellectual property law update for the *Annual Survey of South African Law*. In his update, he discusses the decisions of *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* in the Supreme Court of Appeal¹⁷⁶ as well as the Constitutional Court.¹⁷⁷ He notes quite correctly that there are still valuable *dicta* in the Supreme Court of Appeal's judgment that remain intact even though the Constitutional Court overruled the outcome of the case.¹⁷⁸ Ginsburg notes that 'the judgment of Harms J reflects substantial legal research'.¹⁷⁹ As he notes, the research covers comparative law from American, European and Canadian cases, text books and academic writing. He also refers to the weighing up of the right to freedom of expression and the trademark owner's right to property and freedom of trade, occupation or profession. However, Ginsburg does not say anything about the implications of the decision for the constitutional protection of trademarks and other forms of intellectual property.

Dean, on the other hand, notes the importance of the 'broad issue of the inter-relationship between intellectual property rights and the fundamental right of freedom of [expression]

¹⁷⁴ For a specific discussion of the legal concept of 'detriment' in the context of sec 34(1) (c) of the Trade Marks Act 193 of 1994 and comparative case law on the subject, see Alberts W 'The future of trade mark dilution in South Africa: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and the Freedom of Expression Institute* [2005] 3 BCLR 743 (CC)' (2006) 1 TSAR 212-223 at 214-218.

¹⁷⁵ Ginsburg P 'Intellectual property law' 2005 ASSAL 572-583 at 573-575.

¹⁷⁶ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA).

¹⁷⁷ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁷⁸ See the discussion of Smith A 'Trade-mark dilution: You can't laugh it off' (2004) 12(4) *JBL* 196-200 at 199-200, where he highlights some of the *dicta* of the Supreme Court of Appeal.

¹⁷⁹ Ginsburg P 'Intellectual property law' 2005 ASSAL 572-583 at 573. Also see Smith A 'Trade-mark dilution: You can't laugh it off' (2004) 12(4) *JBL* 196-200 at 197 where he makes a similar comment about the extent of the comparative law used in the Supreme Court of Appeal's judgment.

enshrined in the constitution'.¹⁸⁰ He argues that the owners of trademarks and other intellectual property rights may 'find some comfort' in the judgment on this level even though the factual outcome of the case was that the right to freedom of expression trumped the trademark right. Dean¹⁸¹ refers back to the *First Certification* case,¹⁸² where concerns were raised about the fact that intellectual property rights were not entrenched in a separate constitutional clause. This, it was felt, might lead to intellectual property rights being considered subservient to other entrenched rights if a conflict would arise between the rights. Dean¹⁸³ stresses the importance of the fact that both the judgment of the court per Moseneke J as well as the individual judgment of Sachs J departed from the point that the right to freedom of expression and the right to intellectual property have equal status despite the fact that the right to freedom of expression is entrenched while the right to intellectual property is not explicitly mentioned in the Bill of Rights.¹⁸⁴

Dean¹⁸⁵ furthermore notes the importance of the views of Moseneke J that freedom of expression is not limitless, unqualified or a right ranking above all others. In specific circumstances, law of general application may limit the right to freedom of expression.¹⁸⁶ Dean¹⁸⁷ also notes the importance of the judgment of Sachs J, where it was stated that the issue is not the limitation of a right, but the balancing of competing interests and that it should make no difference whether the case is seen as a 'property rights limitation on free speech or a free speech limitation on property rights.'¹⁸⁸ Dean¹⁸⁹ correctly states that there is no suggestion in these judgments that freedom of expression should be seen as generally superior to the right to intellectual property. In his opinion, the court equated the right to intellectual property and the right to freedom of expression, which is a universally accepted fundamental right entrenched in the 1996 Constitution. He also welcomes 'this belated recognition by the Constitutional Court of the status of intellectual property rights' and sees it

¹⁸⁰ Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 18.

¹⁸¹ Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 19.

¹⁸² *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 75.

¹⁸³ Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 19.

¹⁸⁴ The constitutional property concept has always been wide and no explicit definition of property is given in the constitutional property clause, but all property rights may be included under the clause.

¹⁸⁵ Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 19.

¹⁸⁶ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) par 47.

¹⁸⁷ Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 19.

¹⁸⁸ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) par 81, 83.

¹⁸⁹ Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 19.

as the first step in rectifying the situation that the Constitutional Court had created by refusing to accept the right to hold intellectual property as a fundamental human right. As Dean puts it, ‘Cinderella has been welcomed at the ball!’¹⁹⁰ He sees in this judgment the ‘unequivocal recognition of the right to hold intellectual property as a fundamental right having equal status to the specified fundamental rights in the Bill of Rights’.¹⁹¹ This is not really a new recognition of intellectual property, since the position has always been that intellectual property may be included under the property clause even though Dean would not accept this as adequate.¹⁹²

However, it must be asked why there was no reference made to the constitutional property clause, since the court did go so far as to say that the holder of a trademark has a property right. In the *First Certification* case,¹⁹³ the Constitutional Court made it clear that the constitutional property clause may include an array of interests and that intellectual property is not specifically excluded. Therefore it strikes one as strange that section 25 was never mentioned in *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*.¹⁹⁴ The first reason is that the parties simply did not bring the issue before the court. This may pertain to the fact that the Constitution is still relatively new and that private law specialists are wary of implementing the rights traditionally perceived as ‘public law’ rights in a primarily private law case. The second reason may pertain to the fact that courts are wary of constitutional property cases since they are perceived as being difficult and technical. As a result courts shy away from using the constitutional property clause where a solution may be found by any other means.¹⁹⁵ This is rather unfortunate, since the court passed up a grand opportunity to give more clarity on the meaning of ‘property’ in the constitutional context and more specifically on whether intellectual property, and perhaps the overarching category of immaterial property, may be included under the property clause. Even though the court did offer some form of protection for intellectual property, they did not say under which specific authority that is. However, the court surely did not create a new

¹⁹⁰ Dean OH ‘Trade mark dilution laughed off’ (2005) Oct *De Rebus* 18-22 at 19.

¹⁹¹ Dean OH ‘Trade mark dilution laughed off’ (2005) Oct *De Rebus* 18-22 at 21.

¹⁹² See Dean OH ‘The case for the recognition of intellectual property in the Bill of Rights’ (1997) 60 *THRHR* 105-119.

¹⁹³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

¹⁹⁴ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁹⁵ These two reasons were derived from some of Professor AJ van der Walt’s ideas that were mentioned in the course of seminars on constitutional property law during 2008 and 2009.

category of fundamental rights, so the protection afforded (at least in principle) must have been under the property clause.

5 2 8 Conclusions

Van der Walt¹⁹⁶ states that it is reasonably clear that at least some incorporeal interests will be included as property in the general property clause. Incorporeal interests that are accepted as property in private law should in principle be protected under the constitutional property clause.¹⁹⁷ According to Van der Walt,¹⁹⁸ foreign examples indicate that constitutional property should include ‘intellectual property (patents, copyright and trademarks), certain “rights in rights” (mineral rights, leases, security interests, other commercial property based on contract) and other commercial property interests (shares and licences)’.¹⁹⁹ Chapters 2 (Traditional Immaterial Property Interests) and 3 (Unconventional Immaterial Property Interests) of this dissertation examine the nature of immaterial property interests and their inclusion under the property clause in more detail. Van der Walt²⁰⁰ suggests a general rule, namely that the inclusion of these incorporeal interests should depend on the questions whether the interest can exist independently and whether the rights have vested or been acquired by the claimant according to normal law, common law or statute depending on the particular right.

However, it becomes apparent that there is still no consensus on the interpretation of the Constitutional Court’s decision²⁰¹ on intellectual property and its protection in a separate constitutional clause. Although most authors agree that the constitutional property clause has scope to include intellectual property rights, there are still authors arguing that intellectual property should be protected under a separate constitutional property clause since intellectual property interests need a different kind of protection than other property interests. Van der Walt²⁰² views this as a logical error since the property clause does not specify any particular category of property rights or interests explicitly. As a result it would be impossible to predict

¹⁹⁶ Van der Walt AJ *Constitutional Property Law* (2005) 87.

¹⁹⁷ See for example *Cooper v Boyes NO and Another* 1994 (4) SA 521 (C) where it was decided that shares are incorporeal movable property over which an usufruct may be established.

¹⁹⁸ Van der Walt AJ *Constitutional Property Law* (2005) 87.

¹⁹⁹ Van der Walt AJ *Constitutional Property Law* (2005) 87.

²⁰⁰ Van der Walt AJ *Constitutional Property Law* (2005) 87-88.

²⁰¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

²⁰² Van der Walt AJ *Constitutional Property Clauses* (1999) 352-353 and Van der Walt AJ *Constitutional Property Law* (2005) 95.

which specific kind of protection any category of property could require. Therefore it is also not possible to determine abstractly that the category of intellectual property would necessarily require a different kind of protection than other categories of property. The argument for the separate constitutional protection of intellectual property rights perhaps confuses the differing purposes of private law and constitutional protection respectively. The different kind of protection sought in terms of this argument appears to be additional private law protection rather than protection against state interference or competing constitutional rights; and this is not the purpose of constitutional protection. Even if one does accept Dean's argument for separate protection of intellectual property, which seems unlikely, the position at the moment is that intellectual property does not enjoy separate constitutional protection and consequently the best approach would be to include it under the constitutional property clause.

The current position is that the constitutional property clause is wide enough to protect rights and interests that should be protected according to international human rights standards. This is interpreted to mean that intellectual property rights or traditional immaterial property interests as well as at least certain unconventional immaterial property interests may be included under the constitutional property clause. There are no court cases yet to clarify which immaterial property interests may be included, but it may be assumed that at least property interests that are accepted as property in private law would also be accepted as property for constitutional purposes. Therefore, at the very least, intellectual property rights would be included, although unconventional immaterial property interests may also be included if international human rights standards require this. The acceptance of immaterial property interests as constitutional property rights would afford protection to these interests against arbitrary state interferences as well as the rights of third parties, at least in principle. However, the property clause also has a limitation function, provided in the deprivation and expropriation subsections.

It becomes clear from this discussion that at least certain immaterial property interests may be protected under the constitutional property clause, since its wide scope allows for the protection of all property interests deserving of protection. The *FNB* case²⁰³ provided guidance regarding the procedure that should be followed in a constitutional property case.

²⁰³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

Although the case did not deal with immaterial property interests, it did not exclude the possibility of constitutional protection for immaterial property interests. It has also been shown that the protection pertaining to expropriations and deprivations would apply to and benefit intellectual property rights as well as the broader category of immaterial property interests. Intellectual property could not simply be abolished by an act of parliament, since such an action would have to be constitutionally justifiable under the property clause. In the case of *Laugh It Off v SAB International*²⁰⁴ the Constitutional Court gave implicit protection to trademarks by balancing the entrenched right to freedom of expression with the right of a trademark owner. However, since there are still no court cases giving clarity on which specific immaterial property interests would be included under the constitutional property clause, some guidance may be found in examples from foreign case law.

5 3 Comparative Constitutional Immaterial Property Law

5 3 1 Introduction

Venter²⁰⁵ warns that '[t]o venture into the field of comparative law is to expose oneself to the hazards of philosophy'.²⁰⁶ The risks stem from the fact that legal philosophers tend to use incomprehensible terminology in their process of analysis, categorisation and critique. However, he also cautions that the relevant philosophy cannot be ignored. Comparative lawyers need to make clear what their preferences are on the burning issues lest they be 'interpreted' involuntarily into one of the categories.²⁰⁷ Regarding comparison in the field of constitutional law, Venter states that most comparative law historically took place in the context of private law.²⁰⁸ Although he acknowledges that some work has been done in the field of constitutional comparison, he denies that a systematised and comprehensive field has been developed.

Venter notes certain difficulties faces by all constitutional comparative scholars. These 'include the variation of meaning and content of legal concepts and expressions, differences

²⁰⁴ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

²⁰⁵ Venter F *Constitutional Comparison – Japan, Germany, Canada & South Africa as Constitutional States* (2000) 15.

²⁰⁶ Venter F *Constitutional Comparison – Japan, Germany, Canada & South Africa as Constitutional States* (2000) 15.

²⁰⁷ Venter F *Constitutional Comparison – Japan, Germany, Canada & South Africa as Constitutional States* (2000) 15.

²⁰⁸ Venter F *Constitutional Comparison – Japan, Germany, Canada & South Africa as Constitutional States* (2000) 19-20. Also see Alexander GS *The Global Debate over Constitutional Property* (2006) 17, where he agrees that comparative law previously took place mainly in the area of private law.

in institutions and procedures; and the fact that primary sources are not always readily accessible and methods of interpretation are not constant'.²⁰⁹ It is furthermore rare to find neat, systematic classifications of concepts in public law. The effects of external variables such as socio-economic and political culture and history; and historical differences are more extensive in the field of public law. Finally, he also notes that 'public law tends to be tinted in stronger national tones than private law is'.²¹⁰ Venter²¹¹ also states that no comprehensive, universally valid formulation of the purposes of constitutional comparison may be found, since the purposes of each comparison may vary. The purpose of this comparison is to analyse and discuss the property definitions of constitutional jurisdictions with a particular focus on the jurisdictions that have given specific consideration to the issue of immaterial property interests and its inclusion under the constitutional property concept, in order to find a suitable approach for South African law.

According to Alexander,²¹² the field of comparative constitutional law is currently flourishing in America, although it was rarely used merely ten years ago. He notes that although interpretation is most important, the text of a constitutional property clause is still relevant. There are certain features that all property clauses have in common even though they are not identical. All property clauses make provision for the state to 'expropriate' or 'take' property under specified, restricted circumstances. The two restrictions are generally that the expropriations may only be permitted for a 'public purpose' or 'public use'; and that an expropriation must be compensated to some degree.²¹³ A point of difference is the inclusion of a social-obligation provision, which is absent in the American Constitution, but present in the German Basic Law²¹⁴ and even more pronounced in the South African Constitution. Although Alexander²¹⁵ denies that it is possible to speak of something such as 'the comparative method', he concedes to using interpretation as a main methodological approach.

²⁰⁹ Venter F *Constitutional Comparison – Japan, Germany, Canada & South Africa as Constitutional States* (2000) 19-20.

²¹⁰ Venter F *Constitutional Comparison – Japan, Germany, Canada & South Africa as Constitutional States* (2000) 20.

²¹¹ Venter F *Constitutional Comparison – Japan, Germany, Canada & South Africa as Constitutional States* (2000) 36.

²¹² Alexander GS *The Global Debate over Constitutional Property* (2006) 1.

²¹³ Alexander GS *The Global Debate over Constitutional Property* (2006) 6-7.

²¹⁴ Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949.

²¹⁵ Alexander GS *The Global Debate over Constitutional Property* (2006) 17.

Van der Walt²¹⁶ notes that the question whether incorporeal property interests may be included under constitutional property is specific to legal systems based on Roman-Germanic private law tradition. In Anglo-American jurisdictions, the property concept has always been wider and the distinction between public and private law less strict than in the case of Roman-Germanic jurisdictions. According to section 39(1) (c) of the Constitution, a court, tribunal or forum may consider foreign law when interpreting the Bill of Rights. According to Van der Walt,²¹⁷ the use of foreign law in the interpretation and application of the property clause is a complex and controversial issue. While the interim Constitution was still being drafted, South African lawyers almost automatically used comparative law for the interpretation of the Bill of Rights. This was especially the case with private law property lawyers, who mostly had little or no experience with constitutional law. At this stage, South African lawyers did not have adequate knowledge of comparative constitutional property sources and as such the comparative analysis was not systematic or organised.

Van der Walt²¹⁸ notes that both lawyers and the courts have since then improved their knowledge of constitutional comparison. He also states that since the volume of literature on the subject has increased, the use of comparative materials has been refined. It is now understood that comparison should be done in order to bring new solutions or clarity in specific areas or points of law or interpretation.²¹⁹ In the specific instance of this chapter, the comparative analysis of constitutional property sources should give clarity on the interpretation of the concept of ‘constitutional property’, specifically regarding the inclusion or exclusion of certain immaterial property interests. Attention is given to jurisdictions that provide case law pertaining to the treatment of immaterial property interests under the respective constitutions. Van der Walt²²⁰ argues that the phraseology and structure of a specific property clause is not that important in the interpretation of a property clause²²¹ and even the differences between common-law and civil-law traditions are not all that meaningful, especially if one judges from a private law background.

²¹⁶ Van der Walt AJ *Constitutional Property Law* (2005) 82.

²¹⁷ Van der Walt AJ *Constitutional Property Law* (2005) 19.

²¹⁸ Van der Walt AJ *Constitutional Property Law* (2005) 19.

²¹⁹ Also see Alexander GS *The Global Debate over Constitutional Property* (2006) 17, where he agrees that interpretation is the most important method in comparative constitutional law.

²²⁰ Van der Walt AJ *Constitutional Property Law* (2005) 20-21.

²²¹ Also see Alexander GS *The Global Debate over Constitutional Property* (2006) 17 where he agrees on this point.

However, Van der Walt²²² does caution that one must keep in mind the different social and political contexts which inform the role that property is expected to play in a society and which informs the formulation and interpretation of its constitution.²²³ According to Van der Walt, the purpose of a comparative approach is to learn from the interpretational problems that foreign cases have already uncovered and also to study and ‘analyse different approaches, arguments, tendencies and trends in the solution of those problems’, while keeping in mind the specific localised needs of South Africa. Furthermore, Van der Walt²²⁴ argues that one should not be too suspicious or sceptical about considering foreign law, since a court is not committed to follow foreign law just because it is considered. It could prove to be a useful tool in avoiding the mistakes that have already been made in other jurisdictions. He states that the fear of making the same mistakes should not prevent courts from considering foreign law, but should have the opposite effect since such consideration of foreign law would assist rather than hinder the court in avoiding the same mistakes. Consequently, the court does not necessarily have to follow the specific foreign law that is considered, but could choose not to follow its approach precisely because it has proven to be faulty.

In his comparative article on Commonwealth constitutions, Allen²²⁵ formulates two important questions to be asked when one studies a particular constitutional property clause and the meaning of ‘property’. First, it should be asked whether property has ‘a meaning in constitutional law which differs from its meaning in other branches of the law’ and if it does (as Allen argues), one must ask: ‘[W]hat criteria do the courts employ when deciding whether something is constitutionally protected property?’²²⁶ As far as the constitutional property decisions of Commonwealth jurisdictions are concerned, Allen states that courts have been reluctant to draw on the available literature on the theory of property. He notes that ‘[i]nstead of engaging in a moral, political, or economic analysis of property, they rely on the

²²² Van der Walt AJ *Constitutional Property Law* (2005) 20-21.

²²³ See Alexander GS *The Global Debate over Constitutional Property* (2006) 17 where he agrees that the society’s background legal and political traditions and culture are important considerations in the interpretive process. He also identifies ‘the legal institutional context within which constitutions and the courts interpreting them operate’ as an important factor for interpretation.

²²⁴ Van der Walt AJ *Constitutional Property Law* (2005) 22.

²²⁵ Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 524.

²²⁶ Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 524.

conception of property as a bundle of rights over a tangible or intangible thing'.²²⁷ He states that the 'bundle of rights' concept is applied similarly throughout the Commonwealth, even though the content of such rights may vary in the different jurisdictions. Allen identifies rights in the 'bundle' to include 'the right to exclude others from the thing owned, the right to use or receive income from it, and the right to transfer it to others'.²²⁸ He also gathers from the majority of Commonwealth cases that an individual has property in a specific thing once he or she 'has a sufficient quantity of these rights in a thing'.²²⁹ He states that it varies from case to case how many of these rights are considered necessary to constitute a 'sufficient' amount, but he doubts whether only one would ever be sufficient. He also notes that some rights appear to carry more weight, although the case law does not explain why that would be the case.

As mentioned, the focus of this comparative study will fall on jurisdictions that have specific case law that provide clarity on the inclusion of immaterial property interests under the concept of constitutional property. Van der Walt²³⁰ states that different forms of intangible property are widely accepted as property for purposes of constitutional property protection. Under the German law and also to a lesser extent in Australian law, intellectual property interests (patents, copyright and trademarks) have been accepted as property for constitutional purposes. The decisions accepting these interests as well as other academic works are considered in the sections on German and Australian law later in this chapter. Certain commercial interests also enjoy constitutional protection under jurisdictions such as Germany, Australia, Ireland and the United States of America and as such these decisions warrant some consideration. Money debts, permits, licenses and quotas are mostly treated on the same basic principles, namely that the interest would generally qualify and be protected as property if the interest or right has vested in the claimant in such a way that the legislation creating or assigning the benefit may no longer simply abolish the benefit.²³¹ Germany,

²²⁷ Allen T 'Commonwealth constitutions and the right not to be deprived of property' (1993) 42 *Int & Comp LQ* 523-552 at 429.

²²⁸ Allen T 'Commonwealth constitutions and the right not to be deprived of property' (1993) 42 *Int & Comp LQ* 523-552 at 429.

²²⁹ Allen T 'Commonwealth constitutions and the right not to be deprived of property' (1993) 42 *Int & Comp LQ* 523-552 at 430.

²³⁰ Van der Walt AJ *Constitutional Property Clauses* (1999) 22.

²³¹ The German court's approach provides an answer to Dean's argument (Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119) that intellectual property requires separate constitutional protection against state interferences and abolition. The answer to the question lies in whether the statute or the private law principles result in a positive answer in the case at hand, if not, the matter cannot be solved by constitutional protection. In other words, the property interest created in terms of

Australia and the United States of America have judicial decisions pertaining to these problematic forms of intangible property.²³²

Under German jurisdiction, the so-called ‘new property’ or ‘public-law property’²³³ enjoys a certain measure of constitutional protection. In the United States of America similar attempts have been made to gain protection for the ‘new property’ rights, but with little success. In the United States of America, these rights have received protection under the Due Process Clause,²³⁴ but not yet under the Takings Clause²³⁵ that usually serves to protect property. The Due Process Clause has often protected interests other than property. Van der Walt²³⁶ argues that the due-process protection granted under United States law can hardly be seen as protection of property in the usual sense and for this reason it is still uncertain whether the ‘new property’ is really treated as a form of constitutional property. He also refers to what he calls a ‘third wave’ of property interests, namely body rights, cultural property and religious property. Although these interests have not enjoyed constitutional attention, there has been a fair amount of literature on the subject, especially in the United States.²³⁷ There is also ample literature on the interaction between the right to freedom of expression and intellectual property in the United States.²³⁸ It has to be noted that the United States has a specific constitutional clause that protects and promotes intellectual property interests separately from other forms of property.²³⁹

It is most likely this kind of protection and promotion that Dean²⁴⁰ had in mind when he contended that intellectual property is not adequately protected under the Constitution of the

legislation would only qualify and be protected as property if the interest or right has vested in the claimant in such a manner that the legislation which creates or assigns the benefit may no longer simply abolish the benefit without constitutional scrutiny.

²³² Van der Walt AJ *Constitutional Property Clauses* (1999) 22-23.

²³³ See Chap 3 (Unconventional Property Interests) sec 3.9 for a discussion of the ‘new property’.

²³⁴ Constitution of the United States of America 1787 Fourteenth Amendment 1868.

²³⁵ Constitution of the United States of America 1787 Fifth Amendment 1791 Section 1.

²³⁶ Van der Walt AJ *Constitutional Property Clauses* (1999) 23, 441-444.

²³⁷ See the discussion in Chap 3 (Unconventional Immaterial Property Interests).

²³⁸ See for example Lange DL & Powell HJ *No Law: Intellectual Property in the Image of an Absolute First Amendment* (2009); Jaroff AF ‘Big Boi, Barbie, Dr Seuss, and the king: Expanding the constitutional protections for the satirical use of famous trademarks’ (2008) 57 *American ULR* 641-681.

²³⁹ Article I Section 8 Clause 8 of the Constitution of the United States of America 1787 assigns the express power to Congress ‘[t]o promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their writings and discoveries’.

²⁴⁰ Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 106, 110.

Republic of South Africa 1996, even though the Constitutional Court²⁴¹ made it clear that the constitutional property clause may protect an array of interests and does not only protect interests pertaining to land. The following discussion on foreign case law may provide some guidance in the interpretation of the constitutional property clause, specifically with reference to the property concept and the question of which immaterial property interests should be included under the constitutional property concept. It is not necessary that South African courts should follow these examples, but there is much to be learnt from the approaches and mistakes of other constitutional jurisdictions.

5 3 2 Immaterial Property under the German Basic Law

Property (*Eigentum*) is restricted to tangible, corporeal things in the German *Civil Code*.²⁴² Van der Walt²⁴³ states that although the same term (*Eigentum*) is used in Article 14²⁴⁴ (the property clause) of the Basic Law,²⁴⁵ the Federal Constitutional Court decided in the *Warenzeichen* case²⁴⁶ that the scope of property for the purposes of this guarantee should not merely be determined from the private law concept of corporeal things, but from the property clause itself, keeping in mind the meaning and context of the guarantee in the larger plan of the constitution. Alexander²⁴⁷ adds that the Federal Constitutional Court places little weight on the text of the constitution itself. The Federal Constitutional Court relies on the ‘fundamental purpose’ of property as a constitutional right rather than a direct textual interpretation. Rather it is the values of the constitution that determine what may be included under the scope of constitutional property. All private law property interests are accepted as

²⁴¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) par 75.

²⁴² *Bürgerliches Gesetzbuch* – BGB § 903.

²⁴³ Van der Walt AJ *Constitutional Property Clauses* (1999) 151. Also see Alexander GS *The Global Debate over Constitutional Property* (2006) 124, where he agrees that the constitutional conception of property is not dependent upon the private law concept.

²⁴⁴ The official translation of Article 14 of the Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949 reads as follows:

‘Article 14

- (1) Property and the right to inheritance shall be guaranteed. Their substance and limits shall be determined by law.
- (2) Property entails obligations. Its use should also serve the public interest.
- (3) Expropriation shall only be permissible in the public interest. It may only be ordered by or pursuant to a law which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interests of those affected. In case of disputes regarding the amount of compensation recourse may be had to the ordinary courts.’

²⁴⁵ Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949.

²⁴⁶ *BVerfGE* 51, 193 [1979] (*Warenzeichen* case) 218.

²⁴⁷ Alexander GS *The Global Debate over Constitutional Property* (2006) 124.

property for constitutional purposes, although constitutional property is not limited to these interests; it merely serves as a point of departure.²⁴⁸

Fundamental rights do not only apply to natural persons, but also to domestic juristic persons, as far as the nature of the right permits.²⁴⁹ Van der Walt notes²⁵⁰ that a number of German decisions deal with patrimonial interests and their inclusion or exclusion under the guarantee. These decisions were based on the question whether or not a sphere of personal liberty may be secured for the individual to achieve independence in the patrimonial field, by affording protection to the specific interest through Article 14. As Van der Walt states:

‘The question is whether the interest in question can be said to belong to an individual who can take private initiative and responsibility in using it for her own benefit, while participating in the development and functioning of the broader legal community.’²⁵¹

In a similar vein, Kommers²⁵² states that the subjective character of the property right is specifically accentuated in German constitutional law. According to him, ‘[p]roperty is associated with liberty and personhood; it provides space for the exercise of autonomy and self-realization’.²⁵³ He also stresses the ‘social obligation of property’, which he derives from Article 14(2) and its reference to property’s function to serve the welfare of the public. He also states that there is a social obligation in ownership. Kommers argues that the legislature is granted a wide berth to regulate property in the public interest. However, such regulation ‘may not infringe on the essence of ownership’.²⁵⁴ If the power of eminent domain²⁵⁵ were used in such a way as to interfere with the property rights that are based in personhood, then the public interest would be seen as subject to that right.

Alexander²⁵⁶ also refers to the ‘social obligation’ of ownership under German constitutional property law. He argues that the way in which property is treated by the constitution, textually as well as through the courts’ interpretation, ‘is functionally dynamic and socially

²⁴⁸ Alexander GS *The Global Debate over Constitutional Property* (2006) 124-125.

²⁴⁹ Article 19.3 of the Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949. See Van der Walt AJ *Constitutional Property Clauses* (1999) 126.

²⁵⁰ Van der Walt AJ *Constitutional Property Clauses* (1999) 151.

²⁵¹ Van der Walt AJ *Constitutional Property Clauses* (1999) 151.

²⁵² Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 252.

²⁵³ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 253.

²⁵⁴ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 253.

²⁵⁵ This refers to the power vested in the German legislature in terms of which property may be regulated.

²⁵⁶ Alexander GS ‘Property as a fundamental constitutional right? The German example’ (2003) 88 *Cornell LR* 733-778 at 748.

based'.²⁵⁷ What he means by 'functionally dynamic' is that courts take into consideration social and economic changes that have an effect on the purpose that a particular resource serves at a particular time. According to him, the 'social obligation' of ownership means that 'private property rights are always subordinate to the public interest'.²⁵⁸ It is submitted that Alexander formulates this approach too rigidly, since the German courts usually balance the private property interest and the public interest in order to find a constitutionally justifiable result in a given dispute in order to comply with the relevant constitutional property clause. Neither of these interests should automatically prevail over the other. According to Van der Walt, the social limitations entail that an equitable balance should be 'established (by the legislature) and maintained (by the administration and the judiciary) between individual property interests and the social or public interest in the use of the property'.²⁵⁹

The Federal Constitutional Court has described the scope of constitutional property in a number of landmark cases. The content of property for the purposes of Article 14 is not determined by reference to private law, but by the public law purpose and nature of the property clause.²⁶⁰ However, Van der Walt²⁶¹ notes that the private law concept of property was used as a point of departure in the development of the constitutional property concept. As a result, all traditional private-law property interests were automatically accepted as constitutional property under Article 14. In addition to private-law rights pertaining to corporeal things, private-law rights with regard to immaterial and incorporeal property are included under the guarantee. These include shares, patent rights,²⁶² trademark rights,²⁶³ copyright,²⁶⁴ and the rights of performing artists, contractual money claims,²⁶⁵ debts²⁶⁶ and so

²⁵⁷ Alexander GS 'Property as a fundamental constitutional right? The German example' (2003) 88 *Cornell LR* 733-778 at 748.

²⁵⁸ Alexander GS 'Property as a fundamental constitutional right? The German example' (2003) 88 *Cornell LR* 733-778 at 750.

²⁵⁹ Van der Walt AJ *Constitutional Property Clauses* (1999) 133. In the *Besitzrecht des Mieters* case (*BVerfGE* 89, 1 [1993]), the Federal Constitutional Court had to decide whether a lessee had a property interest in the rental property that is separate from the owner's interest and how far such an interest would be protected against the owner. The Federal Constitutional Court weighed up the different interests, eventually deciding in favour of the owner, although it controversially added that the lessee also held a form of private property.

²⁶⁰ Compare Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 254 where he argues that although the Constitutional Court has tended to approach the definition of constitutional property by looking at the whole Constitution, the reality is that the judges have 'relied more heavily on the historic development of the concept of property in the Civil Code than on any systematic or teleological approach to constitutional interpretation'.

²⁶¹ Van der Walt AJ *Constitutional Property Clauses* (1999) 152. Also see Alexander GS *The Global Debate over Constitutional Property* (2006) 124-125.

²⁶² *BVerfGE* 36, 281 [1974] (patent rights).

²⁶³ *BVerfGE* 51, 193 [1979] (*Warenzeichen* case) (trademarks).

²⁶⁴ *BVerfGE* 31, 229 [1971] (*Urheberrecht* case) (copyright).

²⁶⁵ *BVerfGE* 42, 263 [1976] (*Contergan* case) (contractual money claims).

forth. For the purposes of this chapter, the focus will fall on intellectual property rights and unconventional immaterial property interests as defined in Chapter 2 (Traditional Immaterial Property Interests)²⁶⁷ and 3 (Unconventional Immaterial Property Interests)²⁶⁸ respectively.

Kommers²⁶⁹ states that in 1971, there were five controversial cases which decided that artistic and other intellectual creations are accepted as constitutional property for the purposes of Article 14. However, he states that the nature and extent of the right to intellectual property has to be determined by the legislature in the public interest. The courts have struck down regulations that deny authors and composers fees for the reproduction and distribution of their works. On the other hand, the courts have upheld statutory provisions that made provision for the use of protected material without permission from the creator in specific educational and cultural contexts. Kommers argues that the court treats the right to intellectual property in close proximity with the rights of personality and artistic freedom, more so than in the cases dealing with other forms of property. He notes that the courts also focus on the social character of intellectual property. He states that the so-called *Schoolbook* case,²⁷⁰ the leading opinion in this context, is important not only for the clarity it gives about intellectual property, but also because it brings enlightenment on the standards and principles that inform the Constitutional Court's construction of Article 14's content and limits.²⁷¹

In short, the facts of the *Schoolbook* case²⁷² are as follows: The German parliament amended the Federal Copyright Act in 1965 as to permit the publishing of a collection of 'literary and musical works of small extent, single artistic work, or single photographs' that had already been published before. The collection was meant to assemble 'the works of a considerable number of authors' with the intention, 'by its nature, exclusively for religious, school, or instructional use'.²⁷³ This purpose had to be clearly stated on the title page of such a collected

²⁶⁶ BVerfGE 68, 193 [1984] (debts).

²⁶⁷ Traditional immaterial property interests have been defined as patents, copyrights, registered designs and trademarks, respectively.

²⁶⁸ Unconventional immaterial property interests have been defined as commercial information, confidential information, trade secrets, digital copyright, biotechnological products, traditional knowledge, commercial property, participatory claims and non-proprietary rights, respectively.

²⁶⁹ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 261. For this section I rely heavily on Kommers' translation and interpretation of the German cases pertaining to intellectual property under the constitution as well as Van der Walt AJ *Constitutional Property Clauses* (1999) 151-157.

²⁷⁰ BVerfGE 31, 229 [1971] (*Urheberrecht* case).

²⁷¹ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 261-262.

²⁷² BVerfGE 31, 229 [1971] (*Urheberrecht* case). See Van der Walt AJ *Constitutional Property Clauses* (1999) 152-153.

²⁷³ Section 46 *Urheberrechtsgesetz* BGBl I [1965]: 1273 (Federal Copyright Act 1965).

work. Authors also had to be notified of this use of their work by registered mail before reproduction and distribution of the collection could begin. Quite a few musicians felt that the amendment violated their property rights under Article 14 and therefore filed constitutional complaints. According to the First Senate's judgment, the constitutional complaints were justified. The Federal Copyright Act 1965 distinguishes between the moral rights of authors and their utilisation rights since copyright protects both of these aspects.

The German Federal Constitutional Court²⁷⁴ also stated that a constitutional evaluation must focus solely on the economic aspect of copyright, namely the economic utilisation of an intellectual creation. The question was whether the limitation imposed by the statute on these economic rights of the author is constitutionally justifiable, a question which the court deemed to be within the ambit of Article 14. The Court further stated that the link between personal-artistic creation and its economic utilisation as well as the special nature of the property rights should be considered in the constitutional assessment. Section 46, the amendment to the Federal Copyright Act, was found to be incompatible with Article 14(1), the property guarantee. The Court held that even though the constitution enables the legislature to define the content of property according to social and economic demands, the constitution also restricts the legislature's freedom in this regard. The legislature must ensure the preservation of the core of a right and ensure that it conforms to all constitutional provisions in determining the content of a specific right such as a property right. Similar to tangible property rights, the economic rights of authors may as a result also be shaped by the legal order.

The first function of Article 14(1) is to guarantee the legal institutions of property. In the case of copyright the essence of the right protected by the constitution is the author's right, secured by private law, to have property in his or her creation, including the right to freely dispose thereof. However, not every conceivable use of the property is constitutionally protected. The property guarantee ensures that a basic set of rules are in place to characterise the right as 'private property'. It is the responsibility of the legislature to lay down appropriate standards to allow for the utilisation of a specific category of property in line with Article 14(1) and taking into account the nature and social importance of the right. Section 15 of the Federal Copyright Act allows an author to dispose of his or her work by means of

²⁷⁴ BVerfGE 31, 229 [1971] (*Urheberrecht* case).

contract, but this right is not unlimited and the section contains certain exclusions. According to the court,²⁷⁵ it must also be kept in mind that the legislature is obligated to secure the public good when it circumscribes individual rights. A fair balance must be established between the interests of the public and individual rights. Therefore, whether a provision is constitutionally valid also depends in part on whether it may be justified in terms of the public interest.²⁷⁶

According to the Federal Constitutional Court²⁷⁷ it would not be in the public interest to allow an author to bar the use of his or her work in an educational collection; consequently the contested provision is justifiable. However, as far as the contested provision does not provide for the compensation of authors whose works are used in such a collection, the provision is unconstitutional, since the authors have the right to set certain conditions for the use of their work. Such a provision would impair the economic value of a copyrighted work substantially and not be in line with the property guarantee. There would have to be a very compelling public interest for such a provision to be valid and on the facts of the case there was none. What was decisive, according to the Court, was that no other intellectual property owners were required to donate their creative works free of charge.

Kommers²⁷⁸ also refers to other constitutional property cases dealing with intellectual property and specifically copyright in order to demonstrate that the Court does not blindly protect a complainant's intellectual property right, but weighs up all interests before coming to a decision. In the *Broadcasting Lending* case²⁷⁹ the Federal Constitutional Court had to decide on the constitutionality of a statutory provision that allowed schools to lend out the single works of authors on a non-profit base, after the authors had received equitable remuneration for the original use. According to the court, the provision was not incompatible with the constitutional property clause and was accordingly sustained. In a companion case, the *School Broadcast* case,²⁸⁰ the court ruled that an author does not have to be paid for every broadcast of his work. According to Kommers,²⁸¹ the factor that made this limitation on the

²⁷⁵ BVerfGE 31, 229 [1971] (*Urheberrecht* case).

²⁷⁶ See Van der Walt AJ *Constitutional Property Clauses* (1999) 133.

²⁷⁷ BVerfGE 31, 229 [1971] (*Urheberrecht* case).

²⁷⁸ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 265-266. Also see Van der Walt AJ *Constitutional Property Clauses* (1999) 151-157.

²⁷⁹ BVerfGE 31, 248 [1971].

²⁸⁰ BVerfGE 31, 270 [1971].

²⁸¹ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 266.

author's right to reproduce a work permissible was that the work would possibly have to be broadcast more than once in order to reach all of the school audiences that were intended.

The *Tape Recording I* case²⁸² dealt with a section of the Federal Copyright Act that granted authors a claim against manufacturers of tape recorders that had the ability to reproduce copyrighted works for personal use. The Federal Constitutional Court sustained this particular section because it balanced the interests of the manufacturers; the producers of tape recordings; retailers; and the persons who would ultimately buy these products. The final case in this series of five 1971 copyright cases is the *Phonograph Record* case.²⁸³ In this case the Federal Constitutional Court had to decide whether a change in the Federal Copyright Act should be sustained. The copyright of a recording was changed from the original provision for 50 years to the new provision for only 25 years. The court upheld this provision, noting that public interests may warrant the redefinition of the rights of owners as long as the principles of certainty and proportionality in the law are taken into proper consideration.

Seven years later, another constitutional property case dealt with intellectual property, namely the *Church Music* case.²⁸⁴ The Federal Constitutional Court once again had to balance the interests in the individual and social dimensions of intellectual property. A section of the 1965 Copyright Act that provided for the reproduction of a musical score without permission of the copyright holder and without payment of royalties if it were played at a non-profit public event; in church; or in connection with a religious event was challenged by several composers of church music. The Court referred to the 'social character of intellectual property', meaning that the public interest was also relevant in constitutional intellectual property cases. It was decided that these kinds of performances at a state-sponsored public event may take place without authorisation of the copyright holder, due to the compelling public interest in such an event. The Court confirmed the principle that the public or non-profit character of an event is not always adequate justification to deny royalties or some form of compensation. The Court focused on the part of the provision pertaining to performance in a church and upheld it although, according to Kommers,²⁸⁵ with some reluctance. Kommers also notes that 'the right to remuneration can be overridden only

²⁸² BVerfGE 31, 255 [1971].

²⁸³ BVerfGE 31, 275 [1971].

²⁸⁴ BVerfGE 49, 415 [1978].

²⁸⁵ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 266.

when the public interest prevails in a given situation'²⁸⁶ and that this requires a balancing act. He also notes that there is some suggestion in this case that 'the justices are prepared independently to determine, apart from legislative policy, what kind of intellectual property is deserving of protection under Article 14'.²⁸⁷ The Court is apparently also prepared to protect potential property rights.

Even though a wide interpretation of 'property' is accepted for the purpose of Article 14, Van der Walt²⁸⁸ notes that this wide concept does not mean that any right or interest that is of patrimonial value would be recognised as property. There are two general principles that restrict the constitutional guarantee provided by Article 14. In the first instance, only concrete rights are protected and not merely the general patrimony, wealth or estate of a person. Secondly, only rights vested or acquired in terms of private law, including the applicable legislation, are protected and not mere expectations. This second general statement does not apply absolutely to business property, since it often consists of the possibility to make profits, which may be affected by unlawful state actions pertaining to licenses and permissions.

The property guarantee also covers the so-called social-security rights or 'new property'²⁸⁹ insofar as these rights serve the purpose of Article 14, 'namely that it protects the sphere of liberty of the individual in constituting and organizing her own life in the patrimonial sphere'.²⁹⁰ This concept is important for every immaterial property interest that is not explicitly protected by the constitution in any other clause and therefore the question arises whether protection may be afforded in terms of the property clause. In this context, the requirements derived from this concept is useful for the South African Constitutional Court in determining which immaterial property interests, especially some of the unconventional ones, may be recognised and protected under the constitutional property clause. This concept may be divided into two separate requirements. Firstly, the right must be used to secure the person's existence in society and secondly the right must have vested or been acquired by the person in question. In order for such a right to be regarded as vested, it should be sufficiently separated from the control of the state and acquired by the person to the extent that the right

²⁸⁶ Kammers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 266.

²⁸⁷ Kammers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 266 fn 63.

²⁸⁸ Van der Walt AJ *Constitutional Property Clauses* (1999) 153.

²⁸⁹ See Reich C 'The new property' (1964) 73 *Yale LR* 733-787, where he first developed the concept of social participatory rights as constitutional property.

²⁹⁰ Van der Walt AJ *Constitutional Property Clauses* (1999) 156. Also see Alexander GS 'Property as a fundamental constitutional right? The German example' (2003) 88 *Cornell LR* 733-778 at 765.

may be regarded as belonging to the person. A further requirement usually set by the courts is that the person must have invested adequate own effort or expenditure to acquire the right.²⁹¹ Social-security provisions stemming from the state's duty of social maintenance are not included under constitutional property. Van der Walt²⁹² states that the social-security rights that are included under Article 14 are mostly created by 'statutory, public-law social-security insurance schemes' that are based on substantial own contributions and serve to ensure the person's existence. Claims for state payments, such as repayment of overcharged taxes are also included under Article 14.²⁹³

According to Alexander,²⁹⁴ German courts grant constitutional protection to private property only to the extent that such an interest embodies some other substantive value of the constitution. Alexander argues that the decisions regarding welfare benefits illustrate the relationship between the two constitutional values that he calls 'individual self-realization' and 'civic capacity' very well. The courts have consistently linked these substantive values with constitutionally protected property. By way of example he refers to a 1985 case²⁹⁵ that dealt with the constitutionality of an amendment reducing the health-care benefits received in terms of a federal statute. The Federal Constitutional Court decided that the amendment did not violate Article 14 rights. According to the claimants, the legislature deprived them of a property interest vital to their personal liberty. The Court had to decide whether such benefits qualified as property under the constitutional property clause. The Court set out the conditions that the interest must be vested and that sufficient own contribution must have taken place. This requirement is referred to as the 'Eigenleistung' requirement or the requirement of own effort or own input, investment or contribution.

Van der Walt²⁹⁶ states that the German law conception of 'new property' and its conception in the United States of America should be distinguished. He questions whether the category of public-law property in German law may be compared to the 'new property' as envisioned

²⁹¹ This approach provides a solution to Dean's concern that property interests created in terms of legislation would not receive adequate constitutional protection. See Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 112.

²⁹² Van der Walt AJ *Constitutional Property Clauses* (1999) 157.

²⁹³ Van der Walt AJ *Constitutional Property Clauses* (1999) 157.

²⁹⁴ Alexander GS 'Property as a fundamental constitutional right? The German example' (2003) 88 *Cornell LR* 733-778 at 765.

²⁹⁵ *BVerfGE* 69, 272 [1985] (*Eigenleistung* case; Personal Contribution case).

²⁹⁶ Van der Walt AJ *Constitutional Property Clauses* (1999) 157. Also see Alexander GS 'Property as a fundamental constitutional right? The German example' (2003) 88 *Cornell LR* 733-778 at 766. He agrees that the concept of 'new property' differs in German and American constitutional law.

by Reich²⁹⁷ and applied in the United States of America, since German law applies the strict requirements of vesting and own contribution. This kind of property as defined in German law possibly does not have the government largesse aspect anymore and as such it possibly does not constitute recognition of ‘new property’, since the narrow definition of these kinds of interests brings it very close to the traditional property interests. However, Van der Walt²⁹⁸ also notes that in so far as public-law participation interests are recognised and protected as property in German law, they enjoy substantive protection and not mere due-process protection. In other words, welfare benefits are also included under Article 14 of the Basic Law,²⁹⁹ but only if some form of own contribution is evident.

It appears from this analysis that German constitutional law has accepted a wide meaning of the property concept for constitutional purposes. Although the German courts departed from the point that all private law property interests enjoy constitutional protection, the property concept is not restricted to property interests in private law. Instead, the constitutional property concept is formulated by reference to the social function of constitutional property. A specific interest may be afforded constitutional property protection if this secures a sphere of personal liberty for the individual to achieve independence in the patrimonial field. Property’s function to serve the welfare of the public is also very important and it is central to balance the public interest and private rights.

Artistic and other intellectual creations are accepted as constitutional property for the purposes of Article 14. However, the public interest is an important consideration when the legislature determines the nature and extent of the right to intellectual property. The right to intellectual property is considered in close proximity with the rights of personality and artistic freedom, even more so than in the cases dealing with other forms of property. Courts also focus on the social character of intellectual property. Patents, copyright and trademarks have explicitly been accepted as constitutional property in Constitutional Court cases, in line with the purpose of the constitutional property clause.

Shares, the rights of performing artists, contractual money claims and debts are also accepted as property for constitutional purposes. These interests are recognised and protected in

²⁹⁷ Reich C ‘The new property’ (1964) 73 *Yale LR* 733-787.

²⁹⁸ Van der Walt AJ *Constitutional Property Clauses* (1999) 157.

²⁹⁹ Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949.

private law. However, there is no specific article in the Basic Law³⁰⁰ that provides constitutional protection for these interests. These interests also share certain characteristics with property and for this reason the Federal Constitutional Court is willing to treat them as property in constitutional law. In German law, these interests serve the same purpose as property, namely to secure a sphere of personal liberty for the individual. These interests also only acquire protection if they are vested and acquired in terms of normal law. This approach could be particularly useful for South African courts to determine under which circumstances immaterial property interests may be recognised and protected as constitutional property.

The ‘social obligation’ of ownership is very important in the court’s evaluation of whether a specific property interest should enjoy constitutional protection or not and, if it is protected, what that protection should entail. It is submitted that such an approach could be useful in the South African context in order to determine which immaterial property interests should enjoy constitutional protection under section 25 of the Constitution. It also has to be noted that in South Africa, unlike Germany, intellectual property is accepted as a *sui generis* form of property in private law. This strengthens the argument that intellectual property should be included as property for purposes of the South African constitutional property clause. However, especially for the unconventional immaterial property interests that are not protected as property in private law, the approach that the Federal Constitutional Court developed in the context of welfare benefits could be of particular relevance in determining under which circumstances these interests could be recognised and protected as constitutional property.

5 3 3 Immaterial Property under the Constitution of the United States of America

According to Van der Walt,³⁰¹ the property concept for the purposes of the Fifth³⁰² and Fourteenth³⁰³ Amendments is interpreted widely in American case law. He notes that this is

³⁰⁰ Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949.

³⁰¹ Van der Walt AJ *Constitutional Property Clauses* (1999) 441.

³⁰² The Fifth Amendment 1791 of the Constitution of the United States of America 1787 provides as follows: ‘No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for private use without just compensation.’

³⁰³ The Fourteenth Amendment 1868 of the Constitution of the United States of America 1787 provides as follows:

usually the case in jurisdictions where a constitution guarantees property, but even more so for American law. He states that the American property concept has always been wider than in Roman-Germanic law, since American law is based on English common law, which defines property exceptionally widely. Since the property definition was never problematic in English systems, it does not enjoy as much attention in case law as in continental systems. Van der Walt³⁰⁴ states that constitutional case law does not yet reflect debates about extending the scope of the property concept, although there are interesting discussions in literature on the topic.³⁰⁵

The American Constitution has a clause pertaining specifically to intellectual property, a feature which is quite unique. Article I Section 8 Clause 8 of the Constitution of the United States of America 1787 consigns to Congress the express powers ‘[t]o promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their writings and discoveries’. According to Lange and Powell,³⁰⁶ this clause was usually referred to as the ‘Copyright Clause’ or the ‘Patent Clause’, depending on the subject matter on hand. They state that it is now generally known as the ‘Intellectual Property Clause’ despite the fact that only copyrights and patents originate under the power vested by this clause. This clause has been described as a grant of power as well as a limitation. This clause is generally used by American courts as authority that patents and copyright are not protected under the Takings Clause.³⁰⁷

However, in his article on the history of the constitutional protection of patents, Mossoff³⁰⁸ states that the issue of constitutional protection of patents is not novel and uncertain, but that there are nineteenth century judicial opinions that explicitly granted constitutional protection

‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’

³⁰⁴ Van der Walt AJ *Constitutional Property Clauses* (1999) 441.

³⁰⁵ Examples of these would possibly be commercial information, confidential information, biotechnological products and traditional knowledge respectively as discussed in Chap 3 (Unconventional Immaterial Property Interests). See Radin MJ *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (1996) and Boyle J *Shamans, Software and Spleens – Law and the Construction of the Information Society* (1996).

³⁰⁶ Lange DL & Powell HJ *No Law: Intellectual Property in the Image of an Absolute First Amendment* (2009) 34-35.

³⁰⁷ Constitution of the United States of America 1787 Fifth Amendment 1791 Section 1. See Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 690-691.

³⁰⁸ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 689.

to patents in terms of the Takings Clause.³⁰⁹ He states that this case law has been neglected by recent court decisions as well as scholars and that this position needs to be rectified. He states that patents are property, but ‘[t]he question that haunts scholars and courts today is whether patents also are constitutional private property, falling within the ambit of protections afforded to “private property” under the Takings Clause’.³¹⁰ These scholars and courts have been unanimous in their view that there exists no nineteenth century case law holding that patents are secured under the Takings Clause³¹¹ and Mossoff³¹² argues that this is wrong. He states that the reason for such oversight may pertain to the rejection of the natural rights conception of property by the legal realists at the turn of the twentieth century. This conception of property secured the exclusive rights to acquire, use and dispose of property and was the leading property theory during the eighteenth and nineteenth centuries. The Legal Realists replaced this definition with the theory that property secures mainly the right to exclude and this is the theory relied on in American legal theory today. Mossoff³¹³ argues that this radical transformation affected the way that courts and scholars defined categories of property ‘such as the intangible property in a patent, which is now defined as securing only the right to exclude’.³¹⁴ He argues that this had an impact on the way ‘modern courts and scholars have understood how patent rights were defined and secured in the nineteenth century, when property rights were more broadly conceived as securing exclusive use rights’.³¹⁵

Mossoff³¹⁶ deems this issue important, since patents are increasingly being regulated and as such the constitutional security of these rights is becoming more prominent in American public policy debates. By way of example, he mentions that after 11 September 2001, the

³⁰⁹ Constitution of the United States of America 1787 Fourteenth Amendment 1868 Article [XIV], Section 1.

³¹⁰ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 689.

³¹¹ Constitution of the United States of America 1787 Fourteenth Amendment 1868 Article [XIV], Section 1: ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’

³¹² Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 690-691.

³¹³ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 691.

³¹⁴ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 691.

³¹⁵ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 691.

³¹⁶ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 692.

federal government wanted to suspend Bayer's patent on Cipro so that vast amounts of the antibiotic for the treatment of anthrax could be obtained. Since patents are property, questions are being raised about the constitutionality of such limitations. Mossoff³¹⁷ states that some courts accept patents as constitutional property, while others do not. He also notes that the issue is complicated by a federal statute³¹⁸ that mandates the government to pay 'reasonable and entire compensation' where an invention protected by a patent is used by the government. According to Mossoff, this statutory requirement has been recognised by courts as an execution of the power of eminent domain of the federal government. He argues that this 'tacitly acknowledges that patents are property rights accorded constitutional protection under the Takings Clause'.³¹⁹ In 2002, in the case of *Festo Corp v Shoketsu Kinzoku Kogyo Kabushiki Co*³²⁰ the Supreme Court decided that patent rights are 'the legitimate expectations of inventors in their property'.³²¹ By this statement, the court applied one of the current standards employed by the courts to protect tangible property rights under the Takings Clause.³²²

However, confusion on the issue remains, as illustrated by the 2006 case of *Zoltek Corp v United States*,³²³ where the Federal Circuit court gave a split decision. The court stated that 'patent rights are a creature of federal law' and refused to apply the Takings Clause to patent law.³²⁴ The reason given for this decision was that the owners of patent rights had only the rights provided by Congress and that the federal law, § 1498³²⁵ unveiled that these rights were not secured under the Constitution before the law came into force. This was explained by the court as follows:

'Had Congress intended to clarify the dimensions of the patent rights as property interests under the Fifth Amendment, there would have been no need for the new and limited sovereign immunity waiver.'³²⁶

³¹⁷ Mossoff A 'Patents as constitutional private property: The historical protection of patents under the takings clause' (2007) 87 *Boston ULR* 689-724 at 693-694.

³¹⁸ United States Code Title 28 § 1498.

³¹⁹ Constitution of the United States of America 1787 Fourteenth Amendment 1868 Article [XIV], Section 1.

³²⁰ 535 US 722 (2002).

³²¹ *Festo Corp v Shoketsu Kinzoku Kogyo Kabushiki Co* 535 US 722 (2002) at 723.

³²² Mossoff A 'Patents as constitutional private property: The historical protection of patents under the takings clause' (2007) 87 *Boston ULR* 689-724 at 694.

³²³ 442 F3d 1345 (Fed Cir 2006).

³²⁴ *Zoltek Corp v United States* 442 F3d 1345 (Fed Cir 2006) at 1352.

³²⁵ United States Code Title 28 § 1498.

³²⁶ *Zoltek Corp v United States* 442 F3d 1345 (Fed Cir 2006) at 1352.

The dissenting opinion of the minority of the court argued that patents should be included under the Takings Clause, but still held that a court has not yet addressed this question, ignoring the nineteenth century jurisprudence that did address the question extensively.³²⁷ According to Mossoff,³²⁸ the ‘limited scholarship on patent takings’ agree that the majority opinion of *Zoltek Corp v United States*³²⁹ applied the correct historical background.

Mossoff³³⁰ notes that there are scholars who argue that patents should be included under the Takings Clause, but they argue that it has to be done by extending the 1984 Supreme Court decision of *Ruckelshaus v Monsanto Co*³³¹ to patents. This case decided that trade secrets are private property that may be secured under the Takings Clause. The logic behind such an extension is that both trade secrets and patents are forms of intellectual property, hence both must be protected by the Takings Clause if the one is protected. More broadly, intellectual property scholarship has criticised the expansive protections for copyrights, patents and other forms of intellectual property. They also criticise the ‘property rhetoric’ used in what they call the ‘propertising’ of intellectual property where the traditional limited monopoly language is replaced by the language of property rights.³³² Mossoff³³³ notes that ‘if patents were traditionally defined as limited monopoly privileges, then nineteenth-century courts would not have extended constitutional protection to them as property rights on par with common law rights in land or chattels’.³³⁴

Mossoff³³⁵ sets out the history of patent protection under constitutional law by referring to certain nineteenth century cases that accepted patents as private property for purposes of the

³²⁷ See Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 696.

³²⁸ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 696.

³²⁹ 442 F3d 1345 (Fed Cir 2006).

³³⁰ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 698.

³³¹ 467 US 986 (1984).

³³² For example, see Lemley MA ‘Property, intellectual property, and free riding’ (2005) 83 *Texas LR* 1031-1076 at 1033; Carrier MA ‘Cabining intellectual property through a property paradigm’ (2004) 54 *Duke LJ* 1-146 at 1; Lemley MA ‘Romantic authorship and the rhetoric of property’ (1997) 75 *Texas LR* 873-906 at 902; Samuelson P ‘Information as property: Do Ruckelshaus and Carpenter signal a changing direction in intellectual property law?’ (1989) 38 *Cath ULR* 365-400 at 398.

³³³ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 698-700.

³³⁴ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 700.

³³⁵ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 700-711.

Takings Clause. He states that the 1843 Supreme Court case of *McClurg v Kingsland*³³⁶ laid the foundation for the application of the Takings Clause to property rights in patents. The case found that an Act repealing certain patents could not impair the rights in existing patents. The court also ‘directly linked patents with traditional property rights as a matter of legal and constitutional doctrine’.³³⁷ In the 1876 case of *Cammeyer v Newton*,³³⁸ the Supreme Court stated that ‘private property, the Constitution provides, shall not be taken for public use without just compensation’³³⁹ and applied it to patents. Thereafter, in the case of *McKeever v United States*,³⁴⁰ the court directly answered the question whether patents are included as property for purposes of the Takings Clause in the affirmative. In this case, the United States War Department had used two of McKeever’s patents without his permission. The Government claimed sovereign immunity, claiming that patents did not apply against the Government since patents were special legal privileges granted by the Government.

The court³⁴¹ did not accept the Government’s argument and stated that patents fell within the scope of private property for purposes of protection in terms of the Takings Clause. The court noted that in American law, patents secured inventions and that this is specifically authorised in terms of the Copyright and Patent Clause.³⁴² The court specifically distinguished this from the English law position where patents are viewed as a ‘grant’ issuing from a ‘royal favour’. The Copyright and Patent Clause and the language it employed were analysed to show the distinction between the personal privilege granted in terms of a patent in English law and the American property right for inventions. The words ‘right’ and ‘exclusive’ and the absence of the term ‘patent’ and any express reservation in favour of the Government in the Copyright and Patent Clause were used to demonstrate the difference. The fact that Congress, and not the Executive, was empowered by the Constitution to protect the rights of inventors was further employed to distinguish between these privileges in English law and the American property rights.³⁴³ The court further referred to the natural right to property in order to strengthen the argument that American patent rights were property rights and not mere privileges granted to inventors by the Government. However, the court did not refer to the

³³⁶ 42 US (1 How) 202 (1843).

³³⁷ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 703.

³³⁸ 94 US 225 (1876).

³³⁹ *Cammeyer v Newton* 94 US 225 (1876).

³⁴⁰ 14 Ct Cl 396 (1878).

³⁴¹ *McKeever v United States* 14 Ct Cl 396 (1878) at 420.

³⁴² Article I Section 8 Clause 8 of the Constitution of the United States of America 1787.

³⁴³ *McKeever v United States* 14 Ct Cl 396 (1878) at 421.

difference between patents secured under the federal statute and tangible property rights secured at common law.³⁴⁴

In the case of *Campbell v James*,³⁴⁵ this distinction between patents and tangible property rights was specifically invoked by United States postal officials defending their unauthorised use of a patented device for the postmarking of stamps. The officials claimed immunity on the basis that patent rights were created by federal statute. The court noted that all property is either expressly or implicitly upheld by law and that patents were the same as any other form of property.³⁴⁶ These nineteenth century cases make it clear that historically the issue of patent protection under the Takings Clause is neither novel nor uncertain; patents were protected under the Takings Clause. Somehow this history has been forgotten or lost and modern scholars and courts treat the issue as novel and controversial.³⁴⁷

Ghosh³⁴⁸ argues that intellectual property (copyright, patents, trademarks, trade secrets and unfair competition in American law) should be recognised and protected as property for purposes of the Takings Clause, since this would constitute the best way of protecting intellectual property against state infringements. He states that

‘analyzing intellectual property infringement under the Takings Clause requires a three-part inquiry. First, there must be a governmental use. This part is fairly easy to satisfy by some use of the intellectual property by the state or an agent of the state ... There also must be a use of a protected intellectual property right. It is necessary to look to the relevant positive law to determine whether the owner has a protected interest that was used by the government. This inquiry hinges upon which rights are granted by the relevant intellectual property statute. Therefore, a case-by-case analysis of the intellectual property is appropriate here. Finally, there must be a reduction in the licensing value of the intellectual property.’³⁴⁹

³⁴⁴ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 707.

³⁴⁵ 4 F Cas 1168 (CCSDNY 1879) (No 2, 361). This decision was ultimately reversed by *James v Campbell* 104 US 356 (1981) on the ground that the patent was not valid. However, the Supreme Court (*James v Campbell* 104 US 356 (1981) at 358) still agreed with the court of first instance that the Government may not appropriate or use a patent without just compensation any more than if the property in question were land.

³⁴⁶ *Campbell v James* 4 F Cas 1168 (CCSDNY 1879) (No 2, 361) at 1172.

³⁴⁷ Mossoff A ‘Patents as constitutional private property: The historical protection of patents under the takings clause’ (2007) 87 *Boston ULR* 689-724 at 711.

³⁴⁸ Ghosh S ‘Toward a regulatory takings doctrine for intellectual property: The path left open after *College Savings v. Florida Prepaid*’ (2000) 37 *San Diego LR* 637-709.

³⁴⁹ Ghosh S ‘Toward a regulatory takings doctrine for intellectual property: The path left open after *College Savings v. Florida Prepaid*’ (2000) 37 *San Diego LR* 637-709 at 687-688.

Ghosh applies this three-part enquiry to each category of intellectual property separately. He regards patents as the easiest case for a taking and also refers to the case of *James v Campbell*³⁵⁰ as authority that patents are protected under the Takings Clause just like any other form of property. He states that '[c]opyright is also considered protected property under case law and under the Copyright Act. The difficulty raised by state use of copyrighted work is posed by the fair use doctrine'.³⁵¹ He explains this by referral to the example of a state university making multiple classroom copies of a copyrighted work. The question whether such use would be a taking or not hinges on whether the use may be regarded as fair use or not. He submits that a takings claim would be treated as a statutory claim in the context of copyrights. Unlike patents and copyrights, trademarks allow the owner exclusively to use the mark to distinguish a particular good or service marketed in a particular geographic region. A trademark right is narrower than the rights of patents or copyright, but is perpetual in principle. 'Because of these differences, the key problem raised for characterizing trademark infringement as a taking is one of defining the protected property interest that is infringed upon by state use.'³⁵² Ghosh³⁵³ also agrees with Mossoff³⁵⁴ that the theft of trade secrets is the easiest case to characterise as a taking due to the Court's decision in *Ruckelshaus v Monsanto Co.*³⁵⁵

The case of *Ruckelshaus v Monsanto Co.*³⁵⁶ accepted trade secrets as constitutional property for the purpose of protection under the Takings Clause and there have been attempts by scholars to extend this protection to other forms of intellectual property by analogy. Apart from judicial opinion on the treatment of intellectual property there are also cases that deal with the interaction between intellectual property and freedom of expression in American constitutional law.³⁵⁷

³⁵⁰ 104 US 356 (1981).

³⁵¹ Ghosh S 'Toward a regulatory takings doctrine for intellectual property: The path left open after *College Savings v. Florida Prepaid*' (2000) 37 *San Diego LR* 637-709 at 691.

³⁵² Ghosh S 'Toward a regulatory takings doctrine for intellectual property: The path left open after *College Savings v. Florida Prepaid*' (2000) 37 *San Diego LR* 637-709 at 693-694.

³⁵³ Ghosh S 'Toward a regulatory takings doctrine for intellectual property: The path left open after *College Savings v. Florida Prepaid*' (2000) 37 *San Diego LR* 637-709 at 698.

³⁵⁴ Mossoff A 'Patents as constitutional private property: The historical protection of patents under the takings clause' (2007) 87 *Boston ULR* 689-724 at 698.

³⁵⁵ 467 US 986 (1984).

³⁵⁶ 467 US 986 (1984).

³⁵⁷ For example see Jaroff AF 'Big Boi, Barbie, Dr Seuss, and the King: Expanding the constitutional protections for the satirical use of famous trademarks' (2008) 57 *American ULR* 641-681 and Lange DL & Powell HJ *No Law: Intellectual Property in the Image of an Absolute First Amendment* (2009).

Welfare benefits were in principle recognised as constitutional property by the Supreme Court in *Goldberg v Kelly*.³⁵⁸ This case recognised the ‘new property’ first argued for by Reich.³⁵⁹ The principle that social security benefits had to be treated as property for purposes of the ‘due process’ guarantee once such a right was vested, was established in this case. Black J noted in his dissenting opinion that the majority’s approach implies that an individual is deprived of his own property if the government does not pay a charitable instalment as promised. According to Van der Walt

‘[t]his statement suggests a view in terms of which the due process requirement and the property concept are closely related, so that both affirmation and denial of the applicability of the due process in the context of welfare rights or social rights involve a concomitant affirmation or denial of the property status of these rights in the constitutional property context’.³⁶⁰

However, Van der Walt³⁶¹ also notes that such an interpretation does not fit if one keeps in mind that the ‘new property’ has never been accepted as constitutional property for purposes of the Takings Clause,³⁶² but only for the Due Process Clause.³⁶³ He argues that this may mean that the ‘new property’ is not really accepted for constitutional property purposes, but only for the purposes of due process protection. Van der Walt suggests that it may be argued that the ‘new property’ is not accepted as property at all if it becomes clear that it would never be protected as property for purposes of the Takings Clause. In that case it may be that these welfare rights are merely important interests once they are vested and as such they deserve due process protection.³⁶⁴ According to Van der Walt this issue is still unclear, since the courts insist that the due process clause is applicable to these rights as property rights.

It becomes apparent that there are many different aspects of American constitutional property that are interesting and potentially useful to South African courts. American courts employ a wide definition of the property concept in the constitutional context. There has been a movement to include ‘new property’ under property for constitutional purposes, although these property interests have never been protected under the Takings Clause, only under the

³⁵⁸ 397 US 254 (1970).

³⁵⁹ Reich C ‘The new property’ (1964) 73 *Yale LJ* 733-787.

³⁶⁰ Van der Walt AJ *Constitutional Property Clauses* (1999) 442-443.

³⁶¹ Van der Walt AJ *Constitutional Property Clauses* (1999) 443.

³⁶² The Fourteenth Amendment 1868 of the Constitution of the United States of America 1787.

³⁶³ The Fifth Amendment 1791 of the Constitution of the United States of America 1787.

³⁶⁴ In South African law due process protection is described as administrative justice.

Due Process Clause. Therefore it is still uncertain whether the ‘new property’ is truly accepted as a form of constitutional property.

The subject of patents is uncertain, but the latest court cases have held that patents are not protected under the Takings Clause.³⁶⁵ Although there are certain nineteenth century court cases³⁶⁶ that have decided otherwise, these decisions have not yet been reflected in recent case law and it remains to be seen whether it will be mentioned in future. The argument appears to be that patents and copyright are adequately protected by the ‘Intellectual Property Clause’ and therefore it does not require additional protection from the Takings Clause. In South Africa, intellectual property is not protected in a separate clause, since the South African Constitutional Court³⁶⁷ decided that the property clause provides adequate protection and there is no need for a separate clause pertaining to intellectual property. Although this aspect of American law is therefore not helpful to South African courts, it is still important to note that intellectual property is not unprotected in American constitutional law, it is merely protected separately. As a result, it nonetheless strengthens the argument that intellectual property should be protected under the South African constitutional property clause. Trade secrets are explicitly accepted as property under the American Takings clause.

5 3 4 Immaterial Property under the Australian Commonwealth Constitution

In Australia, constitutional property law is regulated by section 51(xxxi) of the Commonwealth Constitution 1990, which provides that:

‘[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: ... The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws ...’

As Van der Walt³⁶⁸ notes, this constitution does not contain a ‘classic bill of rights’ and as a consequence section 51(xxxi), the property clause, is not a typical property guarantee. Nonetheless, courts treat and recognise this provision as a property guarantee and as such, it has generated important case law pertaining to the constitutional protection of property and

³⁶⁵ *Festo Corp v Shoketsu Kinzoku Kogyo Kabushiki Co* 535 US 722 (2002); *Zoltek Corp v United States* 442 F3d 1345 (Fed Cir 2006).

³⁶⁶ *McClurg v Kingsland* 42 US (1 How) 202 (1843), *Cammeyer v Newton* 94 US 225 (1876) and *McKeever v United States* 14 Ct Cl 396 (1878).

³⁶⁷ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

³⁶⁸ Van der Walt *AJ Constitutional Property Clauses* (1999) 39.

specifically immaterial property interests, which is discussed in this section. Section 51(xxxi) has the purpose of providing as well as restricting the power to acquire property.³⁶⁹

Furthermore, Van der Walt³⁷⁰ notes that the view of the Australian courts is that the property concept should be interpreted widely for section 51(xxxi) purposes, especially since it enjoys the status of ‘a constitutional guarantee of just terms’.³⁷¹ This position was established in the early decision of *Minister of the State for the Army v Dalziel*,³⁷² where the majority of the court found that the formal distinction between ownership and possession should not keep a court from granting constitutional protection. Starke J stated that

‘[p]roperty, it has been said, is *nomen generalissimum* and extends to every species of valuable rights and interest including real and personal property, *incorporeal hereditaments* such as rents and services, rights of way, rights of profit or use in land of another, and choses in action’ [my emphasis].³⁷³

From this it becomes apparent that Australian constitutional law recognises and protects non-proprietary rights as constitutional property. McTiernan J also confirmed that constitutional property refers to any tangible or intangible thing that is protected as property under the law.³⁷⁴ Therefore, where certain strands of the ‘bundle of rights’ of property are acquired, protection in terms of section 51(xxxi) should be as strict as in the case of the acquisition of the full ‘bundle of rights’.³⁷⁵

This position was demonstrated in the case of *Bank of New South Wales v The Commonwealth*³⁷⁶ or the so-called ‘Bank Nationalisation’ case, where the court found that the compulsory acquisition of company shares constituted acquisition of the company. In this case, the Commonwealth was permitted to acquire shares in a private bank and also to

³⁶⁹ Van der Walt AJ *Constitutional Property Clauses* (1999) 41. See *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 where the court confirmed this position. Also see *Clunies-Ross v The Commonwealth of Australia and Others* (1984) 155 CLR 193 at 193.

³⁷⁰ Van der Walt AJ *Constitutional Property Clauses* (1999) 39.

³⁷¹ Also see Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 743 where they state that the courts have ‘taken a wide view of the concept of “property”’.

³⁷² (1944) 68 CLR 261. See Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 743-744 for a discussion of the case.

³⁷³ *Minister of the State for the Army v Dalziel* (1944) 68 CLR 261 at 290. See Van der Walt AJ *Constitutional Property Clauses* (1999) 62.

³⁷⁴ *Minister of the State for the Army v Dalziel* (1944) 68 CLR 261 at 295.

³⁷⁵ See Van der Walt AJ *Constitutional Property Clauses* (1999) 60 and Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 527-528 on the meaning of ‘property’.

³⁷⁶ (1948) 76 CLR 1. See Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 744-745 for a discussion of this case.

acquire assets or the business of a private bank in terms of a statutory provision.³⁷⁷ The provision stipulated that compensation be paid to the owners of the private banks. The Act, however, also allowed the Commonwealth to appoint its own directors to the Board of a private bank in the place of those elected by the shareholders. The court held that this provision constituted an ‘acquisition of property’. This case accordingly seems to be authority at least for the proposition that shares are accepted as constitutional property under section 51(xxxi) of the Australian Commonwealth Constitution. However, while the property concept enjoys a wide interpretation, it is not unlimited.

The case of *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health*³⁷⁸ dealt with the question whether confidential information should enjoy constitutional protection under section 51(xxxi). Gummow J noted that knowledge *per se* is not proprietary in character³⁷⁹ and that the protection of information is not based on a proprietary right in Australian law. The court relied on a dictum of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*³⁸⁰ in order to define property rights as follows:

‘[B]efore a right or interest can be admitted into the category of property, it must be definable, identifiable by third parties, have some degree of permanence or stability, and be capable in its nature of assumption by third parties.’³⁸¹

Gummow J accepted that ‘one should lean towards a wider rather than a narrower concept of property, and look beyond legal forms to the substance of the matter’³⁸² for purposes of the constitutional property guarantee. As a result of this view, he found that there was a proprietary right in the information in this case.

³⁷⁷ Banking Act 1947, now consolidated in the Banking Act 1959.

³⁷⁸ (1990) 95 ALR 87 (FC). See Van der Walt AJ *Constitutional Property Clauses* (1999) 61. Also see Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 531-532, 540.

³⁷⁹ *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 (FC) at 135. See Van der Walt AJ *Constitutional Property Clauses* (1999) 61.

³⁸⁰ [1965] AC 1175. Van der Walt AJ *Constitutional Property Clauses* (1999) 61.

³⁸¹ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

³⁸² *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 (FC) at 136. See Van der Walt AJ *Constitutional Property Clauses* (1999) 61.

As Allen³⁸³ notes, the court distinguished confidential information, which is protected as property, from mere knowledge, which is not protected *per se*. The difference between the two is that equity rules allow the holder of confidential information to withhold others from using it, while knowledge may be freely used.³⁸⁴ Allen argues that the case is important for two reasons, the first being that ‘it supports the idea that control over a resource may establish that one has property in it’.³⁸⁵ However, Van der Walt³⁸⁶ notes that if this rule were applied to basically every regulation, as is possible, it could have disastrous effects, since every regulation would then automatically be classified as an acquisition and the only question left would be to determine whether the specific regulatory taking is material enough to warrant compensation. The second reason pertains to the court’s statement that confidential information was not accepted as property for constitutional purposes simply because it was property in some other sense. Allen³⁸⁷ argues that the true reason for such protection could be found in equity’s protection of confidential information. This protection is derived from an ‘obligation of conscience rather than a pre-existing proprietary right’.³⁸⁸ However, as he notes, the court did not specify any reason why an ‘obligation of conscience’ should be a reason why a specific interest should be protected as property under the Constitution.

Allen³⁸⁹ also notes that in the case of *The Commonwealth of Australia and Another v The State of Tasmania and Others*³⁹⁰ it was decided per Deane J that the acquisition of the right to exclude others from the property was sufficient to constitute property for constitutional purposes. Deane J still held the view that there should be some economic benefit or right of enjoyment accruing to the State before there can be an issue of the taking of property. Contrary to the opinion of Deane J, the majority of the court held that there was no

³⁸³ Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 531.

³⁸⁴ This is in line with Gray’s approach of excludability: Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 268-276. See Chap 4 (The Value of Immaterial Property) for a discussion of excludability and its usefulness in determining when a resource may be deemed property.

³⁸⁵ Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 531.

³⁸⁶ Van der Walt AJ *Constitutional Property Clauses* (1999) 61-62.

³⁸⁷ Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 531.

³⁸⁸ Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 531.

³⁸⁹ Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 532.

³⁹⁰ (1983) 158 CLR 1.

proprietary interest that had been acquired. Van der Walt³⁹¹ notes that an important distinction should be made between the *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health*³⁹² case and the case of *The Commonwealth of Australia and Another v The State of Tasmania and Others*.³⁹³ He notes that neither the courts nor Allen refers to this distinction, namely that in the second case, the plaintiff had been one of the Australian states. Unlike other constitutional property clauses, section 51(xxxi) protects both private persons and states from acquisitions by the Commonwealth, a feature that renders the Australian provision unique.³⁹⁴

Van der Walt³⁹⁵ states that since the property concept is interpreted widely for section 51(xxxi) purposes, it is accepted that tangible as well as intangible property are included under the guarantee. In early cases such as *Minister of State for the Army v Dalziel*³⁹⁶ and *Bank of New South Wales v The Commonwealth*,³⁹⁷ courts were willing to use ‘conceptual severance’³⁹⁸ as a strategy. This meant that the courts identified a right or group of rights from the bundle of rights which it considered particularly valuable and then deemed the acquisition of those rights to be the acquisition of a distinct property right. The problem with such an approach is that it creates a situation where almost any state interference could be identified as an acquisition as meant in section 51(xxxi). Van der Walt³⁹⁹ states that although later court cases still pay lip service to the idea that the property concept should be interpreted widely, the effect of their decisions has been to reduce the scope of constitutional property rather drastically. Courts have been moving towards a more workable definition of ‘property’ than the vague concept that it has to be interpreted widely.

³⁹¹ Van der Walt AJ *Constitutional Property Clauses* (1999) 62.

³⁹² (1990) 95 ALR 87 (FC). Also see Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 531-532, 540.

³⁹³ (1983) 158 CLR 1.

³⁹⁴ Compare this position to German constitutional property case law, which holds that the property guarantee extends only to private persons. See sec 5.3.2 of this chapter. See Van der Walt AJ *Constitutional Property Clauses* (1999) 121-163 on this subject.

³⁹⁵ Van der Walt AJ *Constitutional Property Clauses* (1999) 62.

³⁹⁶ (1944) 68 CLR 261.

³⁹⁷ (1948) 76 CLR 1.

³⁹⁸ See Radin MJ ‘The liberal conception of property: Crosscurrents in the jurisprudence of takings’ (1988) 88 *Col LR* 1667-1696 at 1674ff, where she first coined the phrase ‘conceptual severance’.

³⁹⁹ Van der Walt AJ *Constitutional Property Clauses* (1999) 63.

Since the Australian High Court in principle holds that debts, money payments and claim rights are choses in action⁴⁰⁰ and accordingly property, there is still some confusion in this area.⁴⁰¹ Blackshield, Williams and Fitzgerald⁴⁰² refer to a few of these more recent cases that were decided in 1994. They argue that these cases strongly reaffirmed the notion that some forms of acquisition do not fall within the scope of section 51(xxxi). *Mutual Pools & Staff Pty Ltd v The Commonwealth of Australia*⁴⁰³ was concerned with the extinguishment of a contractual claim for a tax refund through legislation. The High Court held that section 51(xxxi) had not been infringed. The case of *Health Insurance Commission v Peverill*⁴⁰⁴ pertained to a claim for medical care benefits and according to Blackshield *et al*⁴⁰⁵ serves as another example of what the High Court deems not to be an ‘acquisition of property’ for section 51(xxxi) purposes. In this case, the Health Insurance (Pathology Services) Amendment Act 1991 (Cth) reduced the amount of benefits that a pathologist could claim. The majority of the court held that such a retrospective reduction was not an ‘acquisition of property’ for section 51(xxxi) purposes. Brennan J held that the right conferred by the Statute was not ‘property’ for section 51(xxxi) purposes.

Contrary to the previous two cases, in *Georgiadis v Australian and Overseas Telecommunications Corporation*,⁴⁰⁶ the court held that there was an acquisition of property and that the legislation was invalid insofar as it did not provide for ‘just terms’. The court had to decide on the issue of a common-law claim for damages relating to back injuries. The claim had been extinguished by the Commonwealth Employees’ Rehabilitation and Compensation Act 1988 (Cth). The court concurred that a vested cause of action under a general law constitutes a form of property for section 51(xxxi) purposes. It was also held that there was an ‘acquisition of property’, since the Commonwealth received a direct financial benefit by being released from the claim for damages. Another case decided in 1994,

⁴⁰⁰ ‘A chose in action is a comprehensive term used to describe a property right or the right to possession of something that can only be obtained or enforced through legal action. It is used in contradistinction to chose in possession, which refers to cases where title to money or property is in one person but possession is held by another.’ (<http://law.jrank.org/pages/5211/Chose-in-Action.html> (accessed 17 September 2009)).

⁴⁰¹ Van der Walt AJ *Constitutional Property Clauses* (1999) 63-64.

⁴⁰² Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 748.

⁴⁰³ (1994) 179 CLR 155.

⁴⁰⁴ (1994) 179 CLR 226.

⁴⁰⁵ Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 752.

⁴⁰⁶ (1994) 179 CLR 297.

Nintendo Co Ltd v Centronics Systems Pty Ltd,⁴⁰⁷ concerned the practical effects of the Circuit Layouts Act 1989 (Cht). The importation of television games from Taiwan and sale thereof by Centronics, an action that had previously been allowed, now constituted an infringement of Nintendo's intellectual property rights in terms of the Circuit Layouts Act. Centronics argued that this legislation's impact amounted to the 'acquisition of property' and that they were therefore entitled to 'just terms'. The court did not accept their argument.

The court stated that the legislature received the power to make such legislation from section 51(xviii) of the Australian Commonwealth Constitution which pertains to '[c]opyrights, patents of inventions and designs, and trademarks'. This power authorises the making of laws that create, confer and enforce intellectual property rights. As the court stated:

'It is of the nature of such laws that they confer such rights on authors, inventors and designers, other originators and assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights that they create and confer, the grant of legislative power contained in s[ection] 51(xviii) manifests a contrary intention which precludes the operation of s[ection] 51(xxxi).'⁴⁰⁸

Blackshield, Williams and Fitzgerald⁴⁰⁹ state that there is some uncertainty whether this decision⁴¹⁰ and the decisions mentioned earlier⁴¹¹ 'represent a cutting back of the scope of s[ection] 51(xxxi)'.⁴¹² They state that if this is the case, it would support the hypothesis that the court is moving towards a more extensive protection for civil and political rights and consequently shifting its priorities away from economic rights. However, Van der Walt⁴¹³

⁴⁰⁷ (1994) 181 CLR 134. See Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 755-756 for a discussion of the case.

⁴⁰⁸ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

⁴⁰⁹ Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 756.

⁴¹⁰ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

⁴¹¹ *Mutual Pools & Staff Pty Ltd v The Commonwealth of Australia* (1994) 179 CLR 155; *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

⁴¹² Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 756.

⁴¹³ Van der Walt AJ *Constitutional Property Clauses* (1999) 41-48.

notes that these cases have to be viewed in light of the function of section 51(xxxi), namely to regulate federal powers. In these cases,⁴¹⁴

‘the High Court of Australia provided a more comprehensive and systematic explanation of the exclusions from section 51(xxxi). In these decisions it was reiterated that section 51(xxxi) does not apply to all acquisitions of property. A number of exclusions are recognized, and consequently any finding that a specific law or action of the Commonwealth effects an acquisition of property has to be followed by a second inquiry into the question whether the acquisition was an acquisition of property for purposes of section 51(xxxi).’⁴¹⁵

*Mutual Pools & Staff Pty Ltd v The Commonwealth of Australia*⁴¹⁶ explains that section 51(xxxi) does not apply in cases where the state exercises its regulatory or police power.⁴¹⁷ However, where just compensation was required in terms of section 51(xxxi) but not afforded, the section will be applicable.

As demonstrated in this section, the property concept is interpreted widely for purposes of section 51(xxxi). The Australian courts have indicated that some commercial interests and certain immaterial property interests will be treated as property, although a state regulation that governs the conflicting claims of private parties to those interests will not necessarily be seen as an expropriation simply because one party loses its interest. Non-proprietary rights are recognised as constitutional property in Australian law.⁴¹⁸ Shares were also recognised and protected under section 51(xxxi) in *Bank of New South Wales v The Commonwealth*.⁴¹⁹

Confidential information may be treated as property for purposes of section 51(xxxi), but only under specified circumstances, namely if the knowledge is definable, identifiable by third parties, has some degree of permanence or stability and is capable in its nature of assumption by third parties.⁴²⁰ This particular approach could be useful to South African courts in deciding when a particular immaterial property interest that is not protected as

⁴¹⁴ *Mutual Pools & Staff Pty Ltd v The Commonwealth of Australia* (1994) 179 CLR 155; *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

⁴¹⁵ Van der Walt AJ *Constitutional Property Clauses* (1999) 43-44.

⁴¹⁶ (1994) 179 CLR 155.

⁴¹⁷ Van der Walt AJ *Constitutional Property Clauses* (1999) 47.

⁴¹⁸ *Minister of the State for the Army v Dalziel* (1944) 68 CLR 261 at 290.

⁴¹⁹ (1948) 76 CLR 1. See Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 744-745 for a discussion of this case.

⁴²⁰ *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 (FC). See Van der Walt AJ *Constitutional Property Clauses* (1999) 61. Also see Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LJ* 523-552 at 531-532, 540.

property in private law may be recognised and protected as property in constitutional law. This promotes the idea that control over a resource may establish that one has property in the resource;⁴²¹ although this rule should not be interpreted too widely otherwise the legislature would be rendered incapable of regulating.⁴²² Debts, money payments and claim rights are chosen in action under Australian law and as such are protected in terms of section 51(xxxi), although not every regulation is viewed by the courts as an infringement of property rights.⁴²³ The courts are more likely to decide that there was an infringement of property if the right was vested and if the state received some benefit from extinguishing such right.

Section 51(xviii) of the Australian Constitution specifically authorises the legislature to make laws that create, confer and enforce rights in intellectual property (patents, copyright and designs). Therefore, this section both provides for the protection and regulation of intellectual property rights. The approach of Australian courts could be useful for South African courts in determining when immaterial property interests could be protected as constitutional property, particularly if the interest on hand is confidential information or commercial information. The Australian courts accept that commercial information, confidential information and some commercial property interests (shares, debts and claims), participatory claims and non-proprietary rights may be protected in terms of section 51(xxxi), although they are all subject to regulation.

5 3 5 Immaterial Property under the Irish Constitution

According to Van der Walt,⁴²⁴ the Irish constitutional property clause in article 40.3.2 and 43 of the 1937 Constitution⁴²⁵ has to be studied with care, particularly when doing a comparative

⁴²¹ Allen T 'Commonwealth constitutions and the right not to be deprived of property' (1993) 42 *Int & Comp LJ* 523-552 at 531.

⁴²² Van der Walt AJ *Constitutional Property Clauses* (1999) 61-62.

⁴²³ See *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, *Health Insurance Commission v Peverill* (1994) 179 CLR 226 and *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

⁴²⁴ Van der Walt AJ *Constitutional Property Clauses* (1999) 230. Also see Van der Walt AJ 'The protection of private property under the Irish Constitution: A comparative and theoretical perspective' in Carolan E & Doyle O (eds) *The Irish Constitution: Governance and Values* (2008) 398-411 and O'Donnell D 'Property rights in the Irish Constitution: Rights for rich people, or a pillar of free society?' in Carolan E & Doyle O (eds) *The Irish Constitution: Governance and Values* (2008) 412-430.

⁴²⁵ '40.3.2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.' [my emphasis]

43.1.1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

43.1.2 The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

study. This is the case because its interpretation and application by courts create confusion. A general feature of the Irish property clause that Van der Walt notes as interesting is ‘the almost complete lack of concern about the meaning or scope of the term “property”’.⁴²⁶ He argues that this may be because in Anglo law the approach is to simply assume that a wide range of rights pertaining to tangible as well as intangible assets are included under the property concept.⁴²⁷ Similarly, regarding the scope of the property concept in Irish constitutional law, Hogan and Whyte⁴²⁸ state as follows:

‘Most obviously of all, the constitutional guarantee applies to land and to rights arising from land ownership. It also applies to moveable property and money. Intangible rights are also protected – Article 43.1.2 itself refers to a “general right to transfer, bequeath and inherit property” – while the guarantee has been invoked in relation to intangible rights created by legislation and by contract.’ [footnotes omitted]⁴²⁹

The Irish courts have not discussed the meaning of the property concept at length, but there are certain cases that are relevant to this dissertation.

According to Hogan and Whyte,⁴³⁰ intangible property rights are protected under the Constitution. They cite *Phonographic Performance (Ireland) Ltd v Cody*⁴³¹ as proof of this statement. In this case it was decided that ‘[t]he right of the creator of a literary, dramatic, musical or artistic work not to have his or her creation stolen or plagiarised is a right of private property within the meaning of Article 40.3.2 and Article 43.1 of the Constitution, as is the similar right of a person who has applied his or her technical skills and/or capital in the sound recording of a musical work’.⁴³² This case explicitly accepts copyright as a constitutionally protected property right, but the case is also viewed as general authority for the proposition that intangible rights are constitutional property.

Apart from copyright (and by analogy the other intellectual property rights), certain commercial property interests and participatory claims have also been explicitly accepted as

43.2.1 The State recognises, however, that the exercise of the rights mentioned in the foregoing provision of this Article ought, in civil society, to be regulated by the principles of social justice.

43.2.2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.’

⁴²⁶ Van der Walt AJ *Constitutional Property Clauses* (1999) 231.

⁴²⁷ Van der Walt AJ *Constitutional Property Clauses* (1999) 231, 241.

⁴²⁸ Hogan G & Whyte G *JM Kelly: The Irish Constitution* (4th ed 2003) 1971-1972.

⁴²⁹ Hogan G & Whyte G *JM Kelly: The Irish Constitution* (4th ed 2003) 1971-1972.

⁴³⁰ Hogan G & Whyte G *JM Kelly: The Irish Constitution* (4th ed 2003) 1971.

⁴³¹ [1998] 2 ILRM 241, [1994] 2 ILRM 241.

⁴³² *Phonographic Performance (Ireland) Ltd v Cody* [1998] 2 ILRM 241 at 511, [1994] 2 ILRM 241 at 247.

constitutional property in Irish law. *State (Pheasantry Ltd) v Donnelly*⁴³³ dealt with the forfeiture of a liquor licence. The court held that since the license was a privilege granted by statute and subject to change by statute, such forfeiture could not be regarded as an attack upon property rights.⁴³⁴ Van der Walt⁴³⁵ argues that it may be questioned whether this decision actually means that interests in a licence that had been created by statute cannot be regarded as property for constitutional purposes. Another interpretation would be that some licenses are created by statute and are subject to change; therefore such a change would not be regarded as an unfair attack on property. This interpretation is relevant to Dean's⁴³⁶ argument that intellectual property rights require separate constitutional protection because they are created by statute. Dean's argument attempts to isolate intellectual property against regulation, which cannot be done in constitutional law, as demonstrated once again by the Irish case of *State (Pheasantry Ltd) v Donnelly*.⁴³⁷

On this interpretation, namely that statutory regulations to property created in terms of statute do not constitute an unfair attack on property rights, there may still be instances where administrative and statutory limitations on a licence could constitute an unfair attack on the property interest. This last interpretation seems especially appropriate in cases where such a licence has already acquired some financial value. This is similar to the approach followed by the German Federal Constitutional Court, namely that once an interest created by legislation vests in private hands separate from the state grant, it may become a right that is not so easily taken away simply because it was created by statute. Hogan and Whyte,⁴³⁸ by contrast, state that economic interests created by state regulation enjoy little or no constitutional protection. By this they mean that interests would not enjoy constitutional protection if they are purely granted by the state, with no own effort or investment on the part of the recipient visible and no acquisition in terms of private law. In *Maher v Minister for Agriculture, Food and Rural*

⁴³³ [1982] ILRM 512. Also see *Hempenshall v Minister for the Environment* [1994] 2 IR 20, where it was held that although taxi licenses are property, regulations which effectively reduced their value did not constitute an unjust attack on private property.

⁴³⁴ Also see *Hand v Dublin Corporation* [1991] 1 IR 409, where the court reached a similar conclusion to that of the court in *State (Pheasantry Ltd) v Donnelly* [1982] ILRM 512.

⁴³⁵ Van der Walt AJ *Constitutional Property Clauses* (1999) 231, 241.

⁴³⁶ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 113.

⁴³⁷ [1982] ILRM 512. Also see *Hempenshall v Minister for the Environment* [1994] 2 IR 20, where it was held that although taxi licenses are property, regulations which effectively reduced their value did not constitute an unjust attack on private property.

⁴³⁸ Hogan G & Whyte G *JM Kelly: The Irish Constitution* (4th ed 2003) 1972.

Development,⁴³⁹ the court did not decide the question whether a statutory license is constitutional property, accordingly there is still uncertainty in this area. However, the court decided that quotas for the production of goods (granted in terms of a statute) were not property for constitutional purposes.

The relationship between shareholding in a company and the constitutional property guarantee was considered in the case of *Kerry Co-Operative Creameries Ltd v An Bord Bainne*.⁴⁴⁰ The rules of the defendant organisation had been changed and the plaintiffs alleged that these changes amounted to an expropriation of their property. The changes allowed the defendant company to repay a member who had been expelled only the amount that such a member had paid for their shares and consequently the plaintiffs alleged to have been deprived of the accumulated value of the shares. The allocation of bonus shares had also been changed and the plaintiffs made a similar argument as to their deprivation. The constitutional claim based on property rights was hence grounded in their belief that they were entitled to their share in the net value of the board's underlying assets. The judge rejected this argument, stating that shareholders do not have a right to any specific portion of the assets of the company and that this is also the case with the rights of a shareholder in a registered society. The judge ultimately held that no property right was infringed where the value of a shareholding was reduced. The result is that as long as a shareholder's participation rights are not affected, no property right is infringed.

However, two earlier Supreme Court cases⁴⁴¹ held the contrary view that shareholders did have property rights that were protected against unconstitutional legislative attacks. Hogan and Whyte⁴⁴² note that the latest case is most likely not the final word, since these authorities are contradictory. The right to carry on business and earn a livelihood was accepted as property for constitutional purposes in the case of *Re Article 26 and the Employment Equity Bill 1996*.⁴⁴³ The right to a statutory pension was also held to be constitutional property in the case of *Lovett v Minister for Education*,⁴⁴⁴ therefore participatory claims are accepted as

⁴³⁹ [2001] 2 IR 139, [2001] 2 IRLM 481.

⁴⁴⁰ [1990] IRLM 664.

⁴⁴¹ *Private Motorists Provident Society v Attorney General* [1983] IR 339, [1984] IRLM 88; *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23, [1987] IRLM 748.

⁴⁴² Hogan G & Whyte G *JM Kelly: The Irish Constitution* (4th ed 2003) 1976.

⁴⁴³ [1997] 2 IR 321. Also see *Scally v Minister for the Environment* [1996] 1 IR 367, an earlier case actually decided in 1988, that also decided that the right to carry on a business and earn a livelihood is considered a constitutional property right.

⁴⁴⁴ [1997] 1 IRLM 89.

constitutional property. Finally, it should be noted that persons whose property rights enjoy protection are not limited to natural persons. Similar to the position under South African constitutional law, corporate bodies are also entitled to protection for their property.⁴⁴⁵

In summary, Irish constitutional law applies a broad property concept. A wide interpretation of the property clause is therefore followed, which is a tendency that would also be workable in South African constitutional property law. Copyright is explicitly accepted as constitutional property in case law and this is accepted as authority for the broad proposition that immaterial property interests are accepted as constitutional property. This includes, but is not restricted to the other intellectual property rights; namely patents, designs and trademarks). The Irish Supreme Court has dealt with some of the unconventional immaterial property interests explicitly, namely certain commercial property interests (shares and state-granted licenses, permits and quotas) and participatory claims. In certain cases, the Supreme Court was prepared to grant property protection to shares.⁴⁴⁶ However, in a later case, *Kerry Co-Operative Creameries Ltd v An Bord Bainne*,⁴⁴⁷ the court was not prepared to grant property protection to the value embodied by shares. However, the reason for this may simply have been that there was a legitimate state regulation that reduced the value of the shares (which are created in terms of legislation) and that shares are not protected against such a regulation. Shares are created by administrative grant and are therefore always more open to regulatory limitation than other forms of property, even when they have vested. State granted licences and quotas are accepted as constitutional property provided that they have already vested and accrued value, which is similar to the German approach in this regard. The right to a statutory pension is accepted as constitutional property in Irish law, which may be viewed as persuasive authority that participatory claims should be accepted as constitutional property.

5 4 Conclusion

The difference between property protection in private law and constitutional law is important for purposes of this chapter. The purpose of private law protection is to get strong property

⁴⁴⁵ See *Iarnród Éireann v Ireland* [1996] 3 IR 321, [1995] 2 ILRM 161.

⁴⁴⁶ *Private Motorists Provident Society v Attorney General* [1983] IR 339, [1984] ILRM 88; *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23, [1987] ILRM 748.

⁴⁴⁷ [1990] ILRM 664.

rule-type protection for private rights against competing private parties,⁴⁴⁸ while constitutional law recognition and protection has the purpose of conferring bill of rights-type protection for private interests against the state and also where the property rights come into conflict with competing rights of other private parties. Competing rights are weighed up in order to find a constitutionally justified outcome. The immaterial property interests discussed in this dissertation were divided into three groups, namely interests that are already protected as property in private law; interests that are protected in private law or public law, but not as property; and interests that currently receive no protection. The traditional immaterial property interests or intellectual property rights (patents, copyright, designs and trademarks) and some of the other unconventional immaterial property interests already enjoy property rule-type protection in private law. The intellectual property rights are accepted as *sui generis* property rights in private law since the intellectual property legislation confers property rule-type protection to intellectual property rights and private law honours this position. The focus of this chapter was to determine whether these property rights may also enjoy constitutional protection. It is generally accepted in constitutional law that property interests that are recognised and protected as property in private law would also be recognised and protected in as property in constitutional law. As a result, the constitutional recognition and protection of intellectual property rights (patents, copyright, designs and trademarks) is less problematic than unconventional immaterial property interests and their inclusion under the constitutional property concept should be a matter of course.

The recognition and protection of the unconventional immaterial property interests is a more problematic area and the reasons why they should be protected in terms of the property clause are different. With the exception of public participatory rights or participatory claims, which enjoy constitutional protection under socio-economic rights, none of the other immaterial property interests enjoy the possibility of receiving constitutional protection under any clause other than the property clause. Some of the immaterial property interests are recognised and protected in private law under areas other than property law or in public law. They already receive adequate protection albeit not under the area of property law; and as such the only question is whether they may be recognised and protected under the property clause since there is no other constitutional clause that could provide them with the necessary protection. These interests share certain characteristics with intellectual property and tangible property

⁴⁴⁸ Calabresi G & Melamed AD 'Property rules, liability rules, and inalienability: One view of the cathedral' (1972) 85 *Harvard LR* 1089-1128.

and this is the reason why it is desirable to recognise and protect these immaterial property interests under the constitutional property clause.

In South African law, the problem pertaining to the constitutional protection of immaterial property and the narrower category of intellectual property first became apparent in the *First Certification* case.⁴⁴⁹ In this case the Constitutional Court had to decide whether the South African Constitution provided adequate protection for intellectual property. The court held that it was not a universally accepted norm to include a specific right to intellectual property in a separate constitutional clause, but that the scope of the property clause is wide enough to protect property interests that need to be protected according to international standards. Most authors writing on constitutional property law agree that this does not mean that intellectual property is not protected, but that intellectual property may be included under the property clause.⁴⁵⁰ However, Dean⁴⁵¹ argued that the right to intellectual property should have been entrenched in a separate constitutional clause, since intellectual property is fundamentally different from other categories of property; and the property clause does not provide adequate protection. The reason furnished was that intellectual property is created by statute and as such the state would be able to abolish the institution of intellectual property if it were not entrenched in the Constitution. The crux of this argument was apparently that intellectual property rights should be insulated from statutory regulation; and this cannot be done in terms of constitutional law.

German law as well as Australian law clearly illustrates the position that no or limited constitutional protection is available to property interests in instances where the legislature regulates a particular category of property and the regulation does not exceed the legitimate state power to do so. Furthermore, the origin of a particular category of property cannot determine that it is so unique as to render it in need of separate constitutional protection. Also, it is not possible to determine that the property clause would leave owners of intellectual property without recourse, since it is impossible to determine which specific kind

⁴⁴⁹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

⁴⁵⁰ See Van der Walt AJ *Constitutional Property Law* (2005) 86; Alexander GS *The Global Debate Over Constitutional Property* (2006) 163; Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17; and Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-15; Dean OH 'Trade mark dilution laughed off' (2005) Oct *De Rebus* 18-22 at 19.

⁴⁵¹ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106, 110.

of protection is necessary for a distinct property right until a particular state action or right of a third party infringes the right and the court has to adjudicate the matter.

Since the Constitutional Court held that the constitutional property clause is wide enough to protect all the property interests that require protection, it is accepted that the scope of the property clause is wide enough to include interests such as intellectual property rights, certain other immaterial property interests and mineral rights.⁴⁵² It is generally accepted that most property clauses in constitutional jurisdictions do not specify the interests that are protected and that this tendency means that unless a property interest is specifically excluded, it would be protected in terms of a general property clause. The remaining question, which this chapter addresses by reference to examples from foreign law,⁴⁵³ relates to the specific immaterial property interests that may be included as property under the constitutional property clause. A second, separate but equally important aspect is the aspect of limitations imposed by the property clause. As mentioned, the property clause does not insulate property rights against all interferences. The property clause also provides specifically for the deprivation and expropriation of property and the state is allowed to interfere with property insofar as the strict requirements of deprivation and expropriation are adhered to. Furthermore, there are certain instances where the rights of third parties may be viewed as more important than property rights; and their protection may be stronger than that of the property right after a careful balancing of the rights in question has been done by the courts. This is particularly the case where the competing rights embody non-derogable fundamental rights.⁴⁵⁴ The German Federal Constitutional Court utilises a scaling approach in terms of which property rights are balanced with conflicting rights and the public interest by reference to the question whether an individual's particular property right may 'serve the fundamental constitutional purpose of securing a sphere of personal liberty for the individual to take responsibility for her own affairs in the patrimonial field' and protecting or limiting the right accordingly.⁴⁵⁵

⁴⁵² See Roux T & Davis D 'Property' in Cheadle H, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2nd ed 2008) 20-1 – 20-28 at 20-17; Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 46-1 – 46-37 at 46-15; Alexander GS *The Global Debate Over Constitutional Property* (2006) 163; Van der Walt AJ *Constitutional Property Law* (2005) 86. Compare Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106, 110.

⁴⁵³ Sec 39(1) (c) of the Constitution of the Republic of South Africa 1996 states that courts may consider foreign law in interpreting the Constitution.

⁴⁵⁴ See Chap 6 (Immaterial Property Interests in International Law), especially sec 6.4 which identifies specific guidelines from international law instruments that may guide courts in deciding which rights should be protected more stringently where the right to intellectual property conflicts with other rights.

⁴⁵⁵ Van der Walt AJ *Constitutional Property Clauses* (1999) 151.

In general, where intellectual property rights are concerned, their independent existence and vesting are determined by the statute that creates them and once these requirements are met in terms of the statute, the intellectual property rights should be recognised and protected by the constitutional property clause against administrative cancellation and amendment. The question is different for unconventional immaterial property interests. A general rule that may be used to determine whether specific unconventional immaterial property interests should be recognised and protected originated in German constitutional law and asks whether the interest can exist independently and whether it has already vested. Once the interest does exist independently and is regarded as having vested in or being acquired by a particular person in terms of normal law (in terms of the requirements of the particular statute in the case of intellectual property), then such an interest should be recognised and protected as constitutional property.⁴⁵⁶ However, this does not insulate the interests against regulation; and in some cases against sharper regulation than in others. However, for some of the unconventional immaterial property interests, notably participatory claims, the problem is different. The question is also whether participatory claims may be protected against administrative cancellation or amendment and they are created by statute, but they do not necessarily vest or are not acquired as rights due to their nature as pure grants. Therefore no constitutional property protection is available unless own investment or effort is apparent. This links to the property theories discussed in Chapter 4 (The Justification of Immaterial Property), notably the labour theory in terms of which own labour is rewarded with a property right.

It has been argued by Dean⁴⁵⁷ that intellectual property would not be adequately protected by the constitutional property clause because it does not exist and vest in the holder in the same way as traditional property rights. Since intellectual property rights are created by statute, they could also potentially be extinguished by an act of parliament or by administrative action in terms of legislation. However, there are many other forms of property that are also created by legislation and for which the same concerns would also be relevant. The moral rights that cling to certain forms of intellectual property such as copyright have also been mentioned as part of the reason why intellectual property may need additional protection to that afforded to

⁴⁵⁶ Van der Walt AJ *Constitutional Property Law* (2005) 87-88.

⁴⁵⁷ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 106, 110.

other forms of property, or a different form of protection. Dean also argues that the property clause would not prevent the legislature from passing a statute abolishing intellectual property. This indicates that Dean wishes for the constitutional protection of intellectual property to insulate intellectual property against state regulations, which cannot be done in constitutional law. Intellectual property may only be protected against arbitrary state interferences, but in instances where the expropriation or deprivation is legitimate, no additional protection is available or necessary, since property is not absolute.

However, it has been shown that intellectual property would be adequately protected by the constitutional property clause, just like any other form of property. The constitutional property clause provides protection against arbitrary deprivations of property, since the deprivation and expropriation provisions provide strict requirements that the state needs to adhere to. The German Federal Constitutional Court cases discussed also demonstrate how Article 14 could apply to the regulation of copyright⁴⁵⁸ and this indicates that the South African constitutional property clause can also provide protection to intellectual property rights by applying the same principles.

Intellectual property held by a juristic person would also be protected by the South African constitutional property clause, since juristic persons may also be the beneficiaries of constitutional protection provided for their property rights.⁴⁵⁹ This is especially relevant to immaterial property, since many intellectual property rights and unconventional immaterial property rights are held by juristic persons. Although the *FNB* Court⁴⁶⁰ pertinently stated that the case was not concerned with incorporeal property, there was no suggestion that incorporeal property would not be protected if such a case were to come before the court. In fact, the Court stated as follows:

‘It is trite that a company is a legal entity altogether separate and distinct from its members, that its continued existence is independent of the continued existence of its members, and that *its assets are its exclusive property* ... No matter how complex the holding structure of a company or groups of companies may be, ultimately - in the vast majority of cases - *the*

⁴⁵⁸ See sec 5.3.2 of this chapter, *BVerfGE* 31, 229 (*Urheberrecht* case) [1971] (Schoolbook case), *BVerfGE* 31, 248 [1971] (Broadcasting Lending case), *BVerfGE* 31, 270 [1971] (School Broadcast case), *BVerfGE* 31, 255 [1971] (Tape Recording I case), *BVerfGE* 31, 275 [1971] (Phonograph Record case) and *BVerfGE* 49, 415 [1978] (Church Music case).

⁴⁵⁹ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 41-45.

⁴⁶⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 100.

holders of shares are natural persons. More important, for present purposes, is the universal phenomenon that natural persons are increasingly forming companies and purchasing shares in companies for a wide variety of legitimate purposes, including *earning a livelihood*, making investments and for structuring a pension scheme [my emphasis].⁴⁶¹

In the first instance, it is relevant that the Court referred to the assets of a company as its exclusive property, since in many instances intellectual property rights and other immaterial property interests such as trade secrets; confidential information; and commercial property (shares; debts and claims; and state-granted licenses, permits and quotas) form part of the assets of a company. This indicates that the Court would be willing to recognise and protect intellectual property and at least some of the unconventional immaterial property interests. It is also significant that the court mentions the earning of a livelihood as an important consideration in deciding that the recognition and protection of a particular property interest is suitable. This relates to the German approach that a property interest would be protected more strongly if it serves to secure a sphere of personal liberty in the patrimonial area for an individual.⁴⁶²

The Constitutional Court has been required to consider the interaction between the right to freedom of expression and the right of a trademark owner.⁴⁶³ From this case it has become apparent that the court equates the right to freedom of expression and a trademark owner's right, requiring a balancing of these rights. This implicitly gives constitutional recognition to trademarks and by implication also to other intellectual property categories. However, the Court did not specify from which section of the Constitution such protection is derived and no reference was made to the property clause, although it could only have been the property clause unless the Court created a new category of rights, which is unlikely. There have also been no court cases that expressly dealt with the question of whether unconventional immaterial property interests may be protected under the constitutional property clause. In this regard, foreign law may be of particular use to South African courts.

⁴⁶¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 43.

⁴⁶² See sec 5.3.2 of this chapter.

⁴⁶³ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

The second issue pertains to the limitations imposed by the property clause and the effects it could have on immaterial property interests if they were included under the property clause. The sections in the property clause pertaining to deprivation and expropriation would limit intellectual property by allowing constitutional interferences by government and the legislature, similar to any other form of property. The *FNB* case⁴⁶⁴ established guidelines for the procedure to be followed in testing the constitutional legitimacy of deprivations or expropriation of property and this would also be the procedure to follow where the property interest on hand is an incorporeal property interest. Property rights may also be limited by other rights that are valued as fundamental human rights or more important rights. This was demonstrated in the case of *Laugh It Off v SAB International*.⁴⁶⁵ Although the Constitutional Court was prepared to recognise and protect trademarks as constitutional property, on the facts of the case freedom of expression constituted a more important right than the economic rights of a trademark and therefore the right to freedom of expression received stronger protection than the property right in trademarks.

Since section 39(1) (c) of the South African Constitution states that a court may consider foreign law, it has proven valuable to analyse and discuss specific cases from foreign jurisdictions that have shed some light on the question of which immaterial property interests could be included under the property concept for constitutional purposes. This is true even though foreign law can only serve as persuasive authority to South African courts. Since South Africa is a Roman-Germanic jurisdiction, the property concept has always been narrower in private law. As a result the property concept has proven to be more problematic in the constitutional context than has been the case in Anglo-American jurisdictions, which have always employed a wider property concept.

In German constitutional property law, the point of departure is the private law conception of property which is restricted to tangible, corporeal things. However, the constitutional property concept is not restricted to corporeal property. Although interests recognised and protected as property in private law would be included under the constitutional property concept, the concept is not limited to these interests, but may include other interests as well. The purpose and nature of the property clause itself and the context of the Constitution

⁴⁶⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

⁴⁶⁵ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

generate the meaning of ‘property’. A specific interest would usually be protected if it secures a sphere of personal liberty for the individual to achieve independence in the patrimonial field. This links to the property theories discussed in Chapter 4 (The Justification of Immaterial Property Interests). The labour theory rewards own effort with a property right, while the reward theory and incentive theory are based on the idea that the creation of property benefits society at large and that this should be rewarded and incentivised. The personality theory also postulates that property should be protected more stringently the more personal the particular property is. In terms of the economic theory, economic value is also considered to be an important aspect of property in deciding whether a particular property interest may be considered property. It is submitted that this links to the purposive approach to the interpretation of the property concept and that this may be viewed as a guideline to courts in deciding firstly which immaterial property interests may be recognised and protected as constitutional property and secondly how strongly a particular property interests should be protected when it comes into conflict with other rights.

Although intellectual property rights are not recognised and protected as property in German private law, they are recognised and protected as constitutional property. Copyright,⁴⁶⁶ patent rights⁴⁶⁷ and trademark rights⁴⁶⁸ have explicitly been accepted as constitutional property in German constitutional property law in line with the wider constitutional property concept.⁴⁶⁹ The German Federal Constitutional Court considers the right to intellectual property in close proximity with the rights of personality and artistic freedom, more so than rights to other forms of property. The social character of intellectual property is also important. A constitutional evaluation focuses solely on the economic aspect of copyright, namely the economic utilisation of an intellectual creation and such economic rights may be shaped by the legal order. The purpose of Article 14 in the context of copyright is to ensure that the core of the right is protected.⁴⁷⁰ The public interests may serve to limit the constitutional property right relating to copyright, although there must be a very pressing public interest in order to limit a copyright owner’s right to remuneration for the copyrighted work. In such

⁴⁶⁶ *BVerfGE* 31, 229 (*Urheberrecht* case) [1971] (Schoolbook case), *BVerfGE* 31, 248 [1971] (Broadcasting Lending case), *BVerfGE* 31, 270 [1971] (School Broadcast case), *BVerfGE* 31, 255 [1971] (Tape Recording I case), *BVerfGE* 31, 275 [1971] (Phonograph Record case) and *BVerfGE* 49, 415 [1978] (Church Music case).

⁴⁶⁷ *BVerfGE* 36, 281 [1974] (patent rights).

⁴⁶⁸ *BVerfGE* 51, 193 [1979] (*Warenzeichen* case) (trademarks).

⁴⁶⁹ See Van der Walt *AJ Constitutional Property Clauses* (1999) 152-153.

⁴⁷⁰ This corresponds with the core minimum approach as developed in international law. See Chap 6 (Immaterial Property Interests in International Law) sec 6.4.

constitutional cases relating to the protection of copyright works, the Federal Constitutional Court of Germany attempts to balance the individual rights of the property owner and the public interest, in much the same way as applies to cases regarding traditional property interests in corporeal property.

Unconventional immaterial property interests such as shares, contractual money claims⁴⁷¹ and debts⁴⁷² are protected under the German property clause, Article 14 of the Basic Law.⁴⁷³ However, only rights or interests that are concrete and vested or acquired may be protected and not just any right of patrimonial value. They must also serve the purpose of Article 14, namely 'to secure, for the holder of the property, an area of personal liberty in the patrimonial sphere, to enable her to take responsibility for the free development and organization of her own life within the larger social and legal context'.⁴⁷⁴ Welfare rights are protected if the rights are vested and their owner has invested enough own effort so that it can be said to be his or her property. These welfare rights that enjoy protection in German law are not the same as the 'new property'⁴⁷⁵ in American constitutional law since they do not have the government largesse aspect anymore and as such their protection possibly does not constitute the recognition of 'new property'. The narrow definition of these kinds of interests brings them much closer to the traditional property interests than what was originally envisioned in terms of 'new property'. In American constitutional law welfare rights have only ever been afforded due-process protection in terms of the Due Process Clause and not property protection in terms of the Takings Clause.

Similar to the South African property clause and basically every other constitutional property clause, the German property clause also provides for the limitation of property rights in certain instances where there is a compelling 'public purpose' or 'public interest'. In cases where the public interest was very great, the right to remuneration for certain uses of a work could be taken away and in some cases the public interest was found not to be compelling enough. A legislative provision is deemed constitutional if the public interest is compelling enough to justify such interference by government. In summary, German courts seem to grant constitutional protection to property interests if it also serves a constitutional purpose and

⁴⁷¹ *BVerfGE* 42, 263 [1976] (*Contergan* case) (contractual money claims).

⁴⁷² *BVerfGE* 68, 193 [1984] (debts).

⁴⁷³ Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949.

⁴⁷⁴ See Van der Walt *AJ Constitutional Property Clauses* (1999) 124.

⁴⁷⁵ See Reich CA 'The new property' (1964) 73 *Yale LJ* 733-787 at 733-737.

where an interest is not protected as property in private law, it is necessary to determine whether the interest is vested and the person contributed enough own effort to establish the right. However, the protection is not unlimited and interferences with property rights are permitted if the public purpose is compelling enough. This seems to be a sound approach that South African courts could consider in deciding which immaterial property interests may be accepted as constitutional property.

The American Constitution has an Intellectual Property Clause that grants Congress the power to create laws to promote and protect copyright and patent rights. Probably due to the existence of this clause, copyright and patents are not protected by the Due Process Clause. Patents have been held to be protected under the Takings Clause in nineteenth century cases based on their origin in the Copyright and Patent Clause, but more recent cases have denied patents constitutional protection on the grounds that patent rights are granted by the Government. Trade secrets are protected under the American Takings Clause. American constitutional law does protect intellectual property, just not under the Takings Clause, but under the Intellectual Property Clause. Since the South African Constitution does not have an intellectual property clause, protection can only be afforded through the property clause. No specific conclusion can be derived from the American courts' treatment of public participatory rights or 'new property', since these rights are currently only afforded due process protection (which would constitute administrative justice in South Africa) and are not accepted as property for purposes of the Takings Clause yet. The protection has accordingly been thin and it may even be argued that 'new property' is not recognised for constitutional property purposes at all, but only for due process purposes.

Similar to other jurisdictions that guarantee property, the American Takings Clause employs a wide property concept. The American constitutional property concept has not enjoyed too much attention, since a wider concept of property than Roman-Germanic law has always been applied, even in private law. The American property clause is similar to the German and South African clauses, since it does not only protect property, but may also restrict property as long as the requirements for a taking are met.

Section 51(xxxi) of the Australian Constitution regulates federal and state relations in state regulation of property. It is not a traditional property clause, but it is accepted that this section may provide protection to property. The constitutional property concept is also interpreted

widely in Australian constitutional law, similar to German and American law. The case of *Nintendo Co Ltd v Centronics Systems Pty Ltd*⁴⁷⁶ concerned intellectual property. The court referred to section 51(xviii) of the Australian Commonwealth Constitution which pertains to ‘[c]opyrights, patents of inventions and designs, and trademarks’ and authorises the legislature to make laws that create, confer and enforce intellectual property rights. The court stated that the regulation of the intellectual property in the case did not amount to a taking of property that is protected by section 51(xxxi).

The case of *Minister of the State for the Army v Dalziel*⁴⁷⁷ found that the formal distinction between ownership and possession should not keep a court from granting constitutional protection, which may be viewed as authority that non-proprietary rights may also be protected under section 51(xxxi) since the legislature is explicitly permitted to regulate such property. This case also confirmed that both tangible and intangible property interests may be protected. Australian courts followed the ‘conceptual severance’ approach in terms of which the taking of a single right from the ‘bundle of rights’ is considered to be a taking of the whole property. Shares constitute constitutional property under the Australian property clause.⁴⁷⁸ Confidential information is also considered to be constitutional property.⁴⁷⁹

The case of *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health*,⁴⁸⁰ which afforded constitutional protection to confidential information provided an important distinction between confidential information which may be protected and mere knowledge which may not. The difference lies in whether the knowledge is accessible and hence unprotected or whether equity rules allow the holder of confidential information to withhold others from using it. This is directly based on excludability, in other words the knowledge may be protected if it is legally excludable.⁴⁸¹ A general guideline set by the courts is that a right must be definable and identifiable by third

⁴⁷⁶ (1994) 181 CLR 134. See Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 755-756 for a discussion of the case.

⁴⁷⁷ (1944) 68 CLR 261. See Blackshield T, Williams G & Fitzgerald BF *Australian Constitutional Law and Theory Commentary and Materials* (1996) 743-744 for a discussion of the case.

⁴⁷⁸ *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

⁴⁷⁹ *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 (FC).

⁴⁸⁰ (1990) 95 ALR 87 (FC). See Van der Walt AJ *Constitutional Property Clauses* (1999) 61. Also see Allen T ‘Commonwealth constitutions and the right not to be deprived of property’ (1993) 42 *Int & Comp LQ* 523-552 at 531-532, 540.

⁴⁸¹ See Gray K ‘Property in thin air’ (1991) 50 *Cambridge LJ* 252-307 at 268-276. Also see Chap 4 (The Value of Immaterial Property) for a discussion of excludability and its usefulness in determining when a resource may be deemed property.

parties; it must have some degree of permanence or stability; and be capable in its nature of assumption by third parties. There is also the idea that there is property in a resource if a person can exercise control over it. Later cases no longer strictly adhere to the 'conceptual severance' strategy and this has resulted in a narrowing of the scope of property for constitutional purposes. Although the courts hold in principle that debts, money payments and claim rights are choses in action and subsequently property, there have been some contradictory cases lately. As explained in *Mutual Pools & Staff Pty Ltd v Commonwealth*,⁴⁸² section 51(xxxi) does not apply in cases where the state exercises its regulatory or police power.⁴⁸³ This is similar to all the other constitutional property clauses discussed in this chapter.

Irish constitutional law is not particularly concerned with the property concept and simply assumes that tangible and intangible rights are protected. Land and rights arising from land ownership, moveable property, money and intangible rights are protected. Copyright was specifically held to be protected in the case of *Phonographic Performance (Ireland) Ltd v Cody*⁴⁸⁴ and the case is also seen as authority for the general proposition that intellectual property and other forms of incorporeal property are protected under the constitutional property clause. *State (Pheasantry Ltd) v Donnelly*⁴⁸⁵ dealt with the forfeiture of a liquor licence. The court held that such forfeiture could not be regarded as an attack upon property rights since the license was a privilege granted by statute and subject to change by statute.⁴⁸⁶ This may be interpreted to mean that licenses are not protected, but a more likely interpretation would be that such licenses are only protected where they have already acquired some financial value. An interest purely granted by the state would only be protected in constitutional law if there is some own effort or investment on the part of the recipient visible and acquisition in terms of private law. In *Maher v Minister for Agriculture, Food and Rural Development*,⁴⁸⁷ the court decided that quotas granted in terms of a statute are not property for constitutional purposes. Irish constitutional law protects shares as property, but only insofar as own investment is visible. The right to a statutory pension was

⁴⁸² (1994) 179 CLR 155.

⁴⁸³ Van der Walt AJ *Constitutional Property Clauses* (1999) 47.

⁴⁸⁴ [1998] 2 ILRM 241, [1994] 2 ILRM 241.

⁴⁸⁵ [1982] ILRM 512. Also see *Hempenstall v Minister for the Environment* [1994] 2 IR 20, where it was held that although taxi licenses are property, regulations which effectively reduced their value were not considered an unjust attack on private property.

⁴⁸⁶ Also see *Hand v Dublin Corporation* [1991] 1 IR 409, where the court reached a similar conclusion to that of the court in *State (Pheasantry Ltd) v Donnelly* [1982] ILRM 512.

⁴⁸⁷ [2001] 2 IR 139, [2001] 2 IRLM 481.

recognised and protected as constitutional property in Irish law;⁴⁸⁸ hence participatory claims are accepted as constitutional property. In Irish law, corporate bodies are also entitled to property protection, which is similar to the position under South African constitutional law.⁴⁸⁹

All of the foreign jurisdictions considered include at least some categories of immaterial property under their definition of ‘property’ for constitutional purposes. Generally these jurisdictions seem to employ a wide property concept. The majority of the jurisdictions accept that a juristic person may also be a beneficiary of the property right, which is important for intellectual property. Intellectual property interests (patents, designs, copyright and trademarks) are protected under German, American, Australian and Irish law. It must be noted that American and Australian law protect intellectual property under separate clauses.⁴⁹⁰ From a comparative perspective it should be relatively easy to include the traditional immaterial property interests (intellectual property interests, namely patents, designs, copyright and trademarks) under the South African property clause.⁴⁹¹ Most jurisdictions also accept trade secrets as constitutional property. The other unconventional immaterial property interests⁴⁹² are more problematic and not all of these interests are referred to in the foreign case law mentioned in this chapter. Confidential information is accepted as property under the Australian constitutional property clause. Participatory claims are accepted to some extent in both German and American law. Trade secrets are accepted as property for purposes of the American Takings Clause. The cases from the foreign jurisdictions considered in this chapter give some indication as to which immaterial property interests may be included under the constitutional property concept and this may be useful to South African court in future decisions on whether a specific immaterial property interest should enjoy constitutional protection under section 25 of the South African Constitution.

⁴⁸⁸ *Lovett v Minister for Education* [1997] 1 ILRM 89.

⁴⁸⁹ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 41-45.

⁴⁹⁰ Article I Section 8 Clause 8 of the Constitution of the United States of America 1787 and sec 51(xviii) of the Australian Constitution 1900 respectively.

⁴⁹¹ Traditional immaterial property interests have been defined as patents, copyright, registered designs and trademarks, respectively in Chap 3 (Unconventional Immaterial Property Interests).

⁴⁹² Unconventional immaterial property interests have been defined as commercial information, confidential information, trade secrets, digital copyright, biotechnological products, traditional knowledge, commercial property, participatory claims and non-proprietary rights, respectively.

Chapter 6: Immaterial Property Interests in International Law

6 1 Introduction

The aim of this chapter is firstly to give a brief outline of the history of international law and human rights in South Africa and the current status of international law; secondly to identify and discuss international human rights law pertaining to property; and in the last instance to outline the international human rights law relevant to intellectual property rights. The overarching goal of this chapter is to identify specific international human rights instruments that may be useful in the interpretation of the constitutional property clause and more specifically to determine whether immaterial property interests may be included under the property clause in view of the international instruments. Section 39(1) (c) of the Constitution compels South African courts to consider international law in the interpretation of the Bill of Rights.

As a point of first reference, this chapter outlines the previous position of international law in South African courts and the more important role that international law is now required to fulfil, especially in the area of human rights law. Where the Bill of Rights is at issue, courts are required to consult applicable international law instruments, even if South Africa is not a party to the agreement. The question of this dissertation, namely whether immaterial property interests may be protected under the constitutional property clause, is clearly an issue pertaining to the Bill of Rights. Therefore, all applicable international law instruments need to be identified and discussed, since courts would be obligated to consider it in answering the question whether immaterial property interests may be included under the constitutional property concept.

As far as international law is concerned, the right to property and the right to intellectual property are protected in separate human rights instruments. Since some of the unconventional immaterial property rights cannot be considered as categories of intellectual property, it is necessary to broadly discuss the international law instruments pertaining to property and intellectual property, respectively. Both the right to property and intellectual

property are protected under the Universal Declaration of Human Rights (UDHR).¹ However, only the right to intellectual property was entrenched in the International Covenant on Economic, Social and Cultural Rights (ICESCR).² The right to property was not made binding in any of the further covenants. Therefore it is necessary to find some guidance for the construction of the right to property in the European Convention on Human Rights (ECHR).³ It is also necessary to discuss the emerging human rights framework developing for intellectual property rights in international law. Finally, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁴ and its influence on the development of intellectual property rights needs to be discussed briefly. South African courts are obliged to consider all of the above-mentioned international law instruments in deciding whether intellectual property rights and other immaterial property interests may be protected under the constitutional property clause.

6 2 International Human Rights Law in South African Courts

As stated by Dugard,⁵ international law has in the past played an insignificant role in the South African courts' furtherance of human rights. South Africa became a party to the United Nations Charter in 1945. Articles 55 and 56 of this charter obliged member states to promote universal respect for and the observance of fundamental human rights for all persons, without discrimination. However, these provisions were not incorporated into South African law. Once the National Party had come into power there was very little scope for human rights and the government subsequently also abstained from voting on the General Assembly's Universal Declaration of Human Rights (UDHR)⁶ in 1948. This government subsequently refused to become party to any human rights treaty. Dugard⁷ states that as a result, treaties such as the International Covenant on Civil and Political Rights,⁸ the International

¹ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

² United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 Protocol 1 (signed Paris 20 March 1952) Article 1 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)).

⁴ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

⁵ Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 208.

⁶ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁷ Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 208.

⁸ United Nations *International Covenant on Civil and Political Rights* (Dec 16, 1966) 999 UNTS 171 (1976), entered into force Mar 23, 1976 (<http://www2.ohchr.org/english/law/ccpr.htm> (accessed 17 September 2009)).

Convention on the Elimination of all Forms of Racial Discrimination,⁹ the International Covenant on the Elimination of Discrimination against Women¹⁰ and the Convention against Torture¹¹ were not incorporated into South African law.¹²

The South African courts were not powerless and could still summon international human rights law in other ways, yet they hardly ever did so. As long as customary international law did not conflict with legislation, courts were free to apply it since it has always formed part of South African common law. Even though apartheid legislation violated many rights recognised under the UDHR¹³ and there was therefore little scope for the application of customary international law, the courts did not invoke customary rules in the instances where this could have been done.¹⁴ Dugard¹⁵ refers to *S v Petane*¹⁶ and *S v Rudman*¹⁷ as examples where South African courts stated that the UDHR¹⁸ did not form part of customary international law. The court made no attempt to observe legal authority other than that of South Africa in coming to this conclusion. Dugard¹⁹ notes that even though South Africa had signed and ratified the Charter of the United Nations, human rights clauses in the charter could not be directly invoked by South African courts, since the Charter had not been incorporated into municipal law by statute.²⁰

⁹ United Nations *International Convention on the Elimination of all Forms of Racial Discrimination* (Dec 21, 1965) 660 UNTS 195 (1969) (<http://www2.ohchr.org/english/law/cerd.htm> (accessed 25 November 2009)).

¹⁰ United Nations *International Covenant on the Elimination of Discrimination against Women* (Dec 18, 1979) 1249 UNTS 13 (Sept 3, 1981) (<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (accessed 25 November 2009)).

¹¹ United Nations *Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment* (Dec 10, 1984) 1468 UNTS 85 (<http://www.hrweb.org/legal/cat.html>) accessed 25 November 2009)).

¹² Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 208.

¹³ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁴ Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 208-209.

¹⁵ Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 209.

¹⁶ 1988 (3) SA 51 (C) 58G-J.

¹⁷ 1989 (3) SA 368 (E) 376A-B. The court stated that '[h]owever laudable the ideals which have inspired the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European and American conventions they do not form part of customary international law'.

¹⁸ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁹ Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 209.

²⁰ See *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 161B-D, where the court stated that 'it is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process'. Also see Dugard J *International Law: A South African Perspective* (3rd ed 2005) 51-52.

However, where a statute was ambiguous, courts could interpret it in accordance with the presumption that the legislature did not intend to violate international law.²¹ Where human rights conventions and declarations were not binding on South Africa as a custom or a treaty, such conventions could still be invoked by courts as ‘a guide to judicial policy in the formulation of a rule of law’.²² However, courts mostly failed to utilise these limited opportunities to apply international human rights norms.²³ Dugard²⁴ ascribes this to a number of factors. He mentions ‘an unfamiliarity with international law, a lack of awareness of the importance attached to international human rights norms in other jurisdictions and an antipathy to the international human rights movement, which had succeeded in isolating South Africa from the international community’.²⁵ He reasons that the negative attitude of the courts towards international human rights norms also discouraged counsel from raising international human rights arguments in South African courts.

In terms of the 1993 Constitution, international law was meant to play a larger role in the ‘new’ South African legal order and particularly in the area of human rights law. In accordance with section 231(4), ‘[t]he rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic’.²⁶ Dugard²⁷ states that this is nothing new; it merely confirms the common law position. Nonetheless, the inclusion of this provision in the Constitution grants a more elevated status to customary international law. The role of treaties under the Constitution is not as certain as customary international law, but such treaties would be negotiated by the executive and would be binding as soon as it is ratified by Parliament.

Section 35(1) of the 1993 Constitution made it clear that international law had to play an important role in the interpretation of the Bill of Rights. Section 35(1) stated that

‘[i]n interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where

²¹ Dugard J ‘The role of the international law in interpreting the bill of rights’ (1994) 10 *SAJHR* 208-215 at 209; Devenish GE *Interpretation of Statutes* (1992) 212-215; Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 114; *S v Penrose* 1966 (1) SA 5 (N) 11E-F.

²² Dugard J ‘The role of the international law in interpreting the bill of rights’ (1994) 10 *SAJHR* 208-215 at 209.

²³ See *S v Adams*; *S v Werner* 1981 (1) SA 187 (A). Also see *S v Werner* 1980 (2) SA 313 (W); *S v Khanyile* 1988 (3) SA 795 (N) as examples of the courts’ reluctance.

²⁴ Dugard J ‘The role of the international law in interpreting the bill of rights’ (1994) 10 *SAJHR* 208-215 at 210.

²⁵ Dugard J ‘The role of the international law in interpreting the bill of rights’ (1994) 10 *SAJHR* 208-215 at 210.

²⁶ Constitution of the Republic of South Africa 200 of 1993 section 231(4).

²⁷ Dugard J ‘The role of the international law in interpreting the bill of rights’ (1994) 10 *SAJHR* 208-215 at 210.

applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law'.²⁸

Section 39(1) (b) of the 1996 Constitution contains a similar provision, which states that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law'.²⁹ Section 233 of the 1996 Constitution furthermore provides as follows:

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

This provision gives constitutional form to the common law presumption that legislation should be interpreted in line with international law.

Dugard³⁰ argues that the Constitution shows a clear intention to ensure that South African law complies with international law, particularly in the area of human rights. Dugard³¹ explains that international human rights conventions clearly inspired the Bill of Rights. The Bill of Rights also draws substantially on the language and structure of these conventions. For these reasons, Dugard argues that South African courts would have been obliged to make use of international human rights law in the interpretation of the Bill of Rights even if the Bill of Rights made no explicit reference to the courts' use of international law. In the opinion of Dugard,³² South African courts are obliged to give regard to all the sources of international law as recognised in the Statute of the International Court of Justice³³ article 38(1), namely:

- '(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.³⁴

²⁸ Constitution of the Republic of South Africa 200 of 1993 section 35(1).

²⁹ Constitution of the Republic of South Africa 1996 section 39(1) (c). See Dugard J *International Law: A South African Perspective* (3rd ed 2005) 65.

³⁰ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 64-65.

³¹ Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 211.

³² Dugard J 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208-215 at 212.

³³ United Nations *Statute of the International Court of Justice* (June 26, 1945) Stat 1005 TS 993 (<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (accessed 25 November 2009)).

³⁴ United Nations *Statute of the International Court of Justice* (June 26, 1945) Stat 1005 TS 993 art 31(8) (<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (accessed 25 November 2009)).

Dugard³⁵ states that since 1994, the Constitutional Court and the other courts have been willing to utilise international human rights law. Assistance has been provided by decisions of the European Commission and the Court of Human Rights, but views of the United Nations Human Rights Committee and United Nations reports on human rights matters have also occasionally been considered by South African courts. Courts are obliged to consider treaties to which South Africa is not a party in cases where the interpretation of the Bill of Rights is in issue. Where the Bill of Rights is not in issue, no such rule exists regarding treaties to which South Africa is not a party.³⁶ On authority of Dugard,³⁷ the main advantage of this approach is that courts are no longer required to conduct an enquiry as to whether the particular principle in a human rights convention is backed by sufficient practice (*usus*) and *opinio juris* that it may be viewed as a customary rule that is binding on South Africa. The new approach created by section 39(1) (b) of the Constitution allows courts to simply utilise the language of multilateral human rights conventions and decisions related to its interpretation. Section 39(1) (b) does not mandate courts to apply international human rights norms, but merely requires that they ‘consider’ it.³⁸

The question whether intellectual property and the broader category of immaterial property may be included under the South African constitutional property clause is clearly an issue that pertains to the interpretation of the Bill of Rights. Consequently, courts may automatically refer to international human rights instruments, including treaties to which South Africa is not a party. The following sections will outline the international human rights instruments that have particular relevance to immaterial property rights and the sub-category of intellectual property rights. The rationale is to determine how these instruments may assist South African courts in interpreting the constitutional property clause and more specifically to determine which intellectual property interests and other immaterial property interests may be included under the property concept for constitutional purposes. Since intellectual property interests and other property interests are considered separately in international human rights instruments, the two categories are discussed separately.

³⁵ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 66.

³⁶ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 66.

³⁷ Dugard J ‘The role of the international law in interpreting the bill of rights’ (1994) 10 *SAJHR* 208-215 at 213.

³⁸ Dugard J ‘The role of the international law in interpreting the bill of rights’ (1994) 10 *SAJHR* 208-215 at 214. South African courts may therefore have regard to international law principles, but decide not to apply it if it is unsuitable for South Africa. The crux is that these international law instruments and principles must be considered when a court interprets the Constitution or any other legislation.

6.3 Property Rights under International Law

In international law, property rights are protected under article 17 of the Universal Declaration of Human Rights (UDHR).³⁹ This article states that:

‘(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall arbitrarily be deprived of his property.’⁴⁰

However, the right to property is not mentioned in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴¹ or in the International Covenant on Civil and Political Rights (ICCPR),⁴² which are the treaties that convert the human rights in the UDHR⁴³ into legally binding commitments.⁴⁴ Yu attributes this omission to ‘cold-war politics and concerns raised by Socialist countries’.⁴⁵

Article 1 of Protocol Number 1 to the European Convention on Human Rights (ECHR)⁴⁶ guarantees the right to property as follows:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The proceeding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’⁴⁷

The concept of ‘possessions’ has an autonomous meaning that is not linked to the formal classification in national law. The concept of ‘possessions’ is interpreted broadly in case law, since it is not restricted to the right of ownership, but include ‘a whole range of pecuniary

³⁹ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁴⁰ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁴¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

⁴² United Nations *International Covenant on Civil and Political Rights* (Dec 16, 1966) 999 UNTS 171 (1976), entered into force Mar 23, 1976 (<http://www2.ohchr.org/english/law/ccpr.htm> (accessed 17 September 2009)).

⁴³ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁴⁴ Grgić A, Mataga Z, Longar M & Vilfan A *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols. Human Rights Handbooks No 10* (2007) 5.

⁴⁵ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 733. Also see Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1086-1088.

⁴⁶ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 Protocol 1 (signed Paris 20 March 1952) Article 1 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)).

⁴⁷ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 Protocol 1 (signed Paris 20 March 1952) Article 1 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)).

rights such as rights arising from shares, intellectual property such as patents, arbitration award, established entitlement to a pension, entitlement to a rent, and even rights arising from running of a business'.⁴⁸

In the French version of the text of Protocol 1, Article 1, the word '*biens*' is used and this word relates to all patrimonial rights. This is used as authority for the broad interpretation of the concept of 'possessions'.⁴⁹ The protection of Article 1 only applies if it is possible to lay a claim to a certain property and it does not guarantee the right to acquire property. For example, a mere expectancy to inherit would not be protected.⁵⁰ Van der Walt⁵¹ states that Article 1 is read as if the property guarantee simply refers to property in general and in particular to the ownership of property. He also agrees with the interpretation that Article 1 only protects property that is already in existence, in other words if an applicant is able to prove a valid claim.⁵² This is similar to the German approach which requires that a particular property interest must have been acquired before it may be protected as constitutional property. This approach could be of particular use to South African courts in determining which of the unconventional immaterial property rights could be recognised and protected by the property clause, particularly the interests that are not protected as property in private law.

Allen states that '[w]here an applicant claims that a Convention right has been breached, the court must first determine whether the right is applicable to the facts or, as it is often put, whether the right is engaged'.⁵³ Under Article 1, 'a generous view of applicability does not

⁴⁸ Grgić A, Mataga Z, Longar M & Vilfan A *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols. Human rights handbooks No 10* (2007) 7. See for example *Marckx v Belgium* [1979] ECHR Series A vol 31; *Handyside v United Kingdom* [1976] ECHR Series A vol 24; *Pine Valley Developments Limited and Others v Ireland* [1991] 14 EHRR 319; *Tre Traktörer AB v Sweden* [1989] ECHR Series A vol 159; *Stran Greek Refineries and Stratis Andreadis v Greece* [1995] ECHR Series A vol 31B citing Van der Walt *AJ Constitutional Property Law* (2005) 116-118, where he discusses these cases.

⁴⁹ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 Protocol 1 (signed Paris 20 March 1952) Article 1 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)); Grgić A, Mataga Z, Longar M & Vilfan A *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols. Human rights handbooks No 10* (2007) 7.

⁵⁰ Grgić A, Mataga Z, Longar M & Vilfan A *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols. Human rights handbooks No 10* (2007) 7. See *Marckx v Belgium* Series A no 31 (1979) 2 EHRR; *Handyside v United Kingdom* [1976] ECHR Series A vol 24. Also see Van der Walt *AJ Constitutional Property Law* (2005) 116-117. Especially see Allen T *Property and the Human Rights Act 1998* (2005) 39-46.

⁵¹ Van der Walt *AJ Constitutional Property Law* (2005) 116.

⁵² See *Pine Valley Developments Limited and Others v Ireland* (1991) 14 EHRR 319; Van der Walt *AJ Constitutional Property Law* (2005) 116-117 for a discussion of this case.

⁵³ Allen T *Property and the Human Rights Act 1998* (2005) 39.

necessarily extend the State's obligations or enhance the protection of property, except in the limited sense that it extends the circumstances in which the State can be called upon to justify its actions'.⁵⁴ Allen⁵⁵ notes that Article 1 was not formulated particularly precisely, since the words 'possessions' and 'property' are used interchangeably and Article 1 also refers initially to the '*enjoyment* of possessions' and later to the '*use* of property'. Apart from the discrepancies in the French and English texts, Allen also notes that the use of the term 'possessions' is not general in common law and that the term 'property' is more often used in most common law constitutions.

Despite this, Allen⁵⁶ states that 'possessions' is clearly the general term Article 1 employs to refer to all categories of proprietary interests, including the rights to acquire and dispose of property. The Court has accepted that if national law classifies a property interest as property, then it would also constitute a possession for the purposes of Article 1. The Court's approach was initially more restrictive regarding applicability and it was held that the concept of possessions applies only to existing possessions.⁵⁷ In *Inze v Austria*,⁵⁸ the formal approach, in terms of which vested rights which are included under Article 1 are distinguished from the mere hope of acquiring a property interest, was confirmed. This is also similar to the German requirement that an interest should be vested before it would enjoy constitutional property protection and this could also be of use to South African courts regarding the question whether unconventional immaterial property interest may be protected as constitutional property. However, the Article 1 meaning of 'possessions' is not limited to interests accepted as property under national law. In *Gasus Dosier-und Fördertechnik GmbH v Netherlands*,⁵⁹ the Court held that the concept of 'possessions' does not include only limited to the ownership of physical goods, but has an autonomous meaning which may include other rights and interests that may constitute 'property' and consequently also 'possessions' for purposes of Article 1.

⁵⁴ Allen T *Property and the Human Rights Act 1998* (2005) 39.

⁵⁵ Allen T *Property and the Human Rights Act 1998* (2005) 40.

⁵⁶ Allen T *Property and the Human Rights Act 1998* (2005) 40-42. Also see Allen T 'Commonwealth constitutions and the right not to be deprived of property' (1993) 42 *Int & Comp LQ* 523-552 where he argues that 'property' has an autonomous meaning in constitutional law.

⁵⁷ See *Marckx v Belgium* Series A no 31 (1979) 2 EHRR at 330.

⁵⁸ Series A No 126 (1988) 10 EHRR 394.

⁵⁹ Series A No 306-B (1995) 20 EHRR [53].

Allen⁶⁰ notes two broad questions raised by the autonomous meaning doctrine. The first question asks what would count as ‘possessions’ for purposes of Article 1, while the second question relates to the function of the doctrine in relation to Article 1. Regarding the first question, Allen suggests that the autonomous meaning doctrine would not allow the Court to find vested rights where there is no personal or proprietary right in national law. Instead, the Court would be permitted to classify a bundle of rights classified as a non-proprietary interest in national law as a ‘possession’ for Article 1 purposes. He also suggests that the function of the doctrine may be to prevent states from relabeling rights in order to avoid being called to justify their actions. Furthermore, the laws of other states are also considered in construing the meaning of ‘possessions’ in order to secure common standards. The autonomous meaning’s purpose is also to take into account the fact that the Court often construes Article 1 as a general protection for wealth and also construes its meaning within the Convention and Protocols as a whole. Furthermore, it reflects the Court’s perception of its capacity to ensure that states conform to Convention standards.⁶¹

Van der Walt⁶² agrees that the property concept (the concept of ‘possessions’) in Article 1 has always been interpreted more widely than in the national legal systems, including both real rights and creditors’ rights. Both movable and immovable categories of property are included under Article 1.⁶³ For purposes of this wider property concept under Article 1, the economic interests in a restaurant (including a liquor licence)⁶⁴ as well as a final, binding arbitration award⁶⁵ constitute property. Van der Walt⁶⁶ states that this is in line with the general view that a vested or accrued money debt is protected as property. Allen⁶⁷ notes that a share in a company is also accepted as a ‘possession’ for Article 1 purposes. A contractual

⁶⁰ Allen T *Property and the Human Rights Act 1998* (2005) 43-45.

⁶¹ Allen T *Property and the Human Rights Act 1998* (2005) 42-45.

⁶² Van der Walt AJ *Constitutional Property Law* (2005) 117.

⁶³ See *Wiggins v The United Kingdom* [1978] 13 DR 40, where it was stated unequivocally that Article 1 protects both movable and immovable property. Also see Van der Walt AJ *Constitutional Property Law* (2005) 117.

⁶⁴ See *Tre Traktörer AB v Sweden* [1989] ECHR Series A vol 159. See Allen T *Property and the Human Rights Act 1998* (2005) 75-78.

⁶⁵ See *Stran Greek Refineries and Stratis Andreadis v Greece* [1995] ECHR Series A vol 31B at 86.

⁶⁶ Van der Walt AJ *Constitutional Property Law* (2005) 117. See Allen T *Property and the Human Rights Act 1998* (2005) 46-57 for a more detailed discussion of the reasons why a debt is protected as a ‘possession’ in terms of Article 1.

⁶⁷ Allen T *Property and the Human Rights Act 1998* (2005) 46. See *Lithgow v The United Kingdom* Series A No 102 (1986) 8 EHRR 329.

right over property is also accepted as a ‘possession’.⁶⁸ Compulsory contributions to a state pension may under certain circumstances establish a right to the payment of pension benefits, which is accepted as property for the purposes of Article 1. The test used to determine whether such a payment constitutes property, ‘is whether there is a direct relationship between the contributions and the expectation of receiving pension benefits’.⁶⁹

From the next section of this chapter it will become clear that intellectual property rights are protected in separate conventions under international law. However, other immaterial property interests that do not fall under the category of intellectual property may be protected under Article 1 of Protocol 1 of the ECHR.⁷⁰ These cases of the European Human Rights Court could assist South African courts in determining which immaterial property interests could be included under the constitutional property clause. However, these cases can merely serve as persuasive authority on par with foreign law, since they are part of regional international law of the European Union. The ECHR is a regional (European) instrument to which South Africa can never accede. Article 14 of the African (Banjul) Charter on Human and Peoples’ Rights⁷¹ is a regional international instrument to which South Africa (a member of the African Union) is party. However, since the cases decided in terms of this Charter presently have no binding force they are currently of limited use, but they may prove to be of value to South African courts in future.

6 4 Intellectual Property Rights under International Law

6 4 1 Introduction

Dean⁷² states that the Universal Declaration of Human Rights (UDHR)⁷³ of 1948 and International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁴ of 1966 may be

⁶⁸ Allen T *Property and the Human Rights Act 1998* (2005) 46. See *Gasus Dosier-Und Fördertechnik GmbH v The Netherlands* Series A No 306-B (1995) 20 EHRR [53] and *Wilson v Secretary of State for Trade and Industry* [2004] 1 AC 816.

⁶⁹ Van der Walt AJ *Constitutional Property Law* (2005) 118. See *X v United Kingdom* [1970] YB 13 892 and *X v The Netherlands* [1971] YB 14 224. See Allen T *Property and the Human Rights Act 1998* (2005) 71-75.

⁷⁰ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 Protocol 1 (signed Paris 20 March 1952) Article 1 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)).

⁷¹ African Union *African (Banjul) Charter on Human and Peoples’ Rights* (June 27, 1981) OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) (http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf (accessed 28 July 2010)). Article 14 provides as follows: ‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.’

⁷² Dean OH ‘The case for the recognition of intellectual property in the bill of rights’ (1997) 60 *THRHR* 105-119 at 108-109.

used to prove that the protection of the right to hold intellectual property rights is internationally accepted. He identifies article 27(2) of the UDHR⁷⁵ as a starting point to prove the international acceptance of intellectual property rights as a fundamental human right. This article states that '[e]veryone 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'.⁷⁶ Dean⁷⁷ states that the purpose of this declaration is to set a universal standard for all nations, in order for all nations to observe and realise these fundamental rights.

Dean⁷⁸ observes that article 15 of the ICESCR⁷⁹ is 'clearly derived from the UDHR',⁸⁰ since article 15(c)⁸¹ states that everyone has the right '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'.⁸² This Covenant creates binding obligations for state parties, unlike the UDHR,⁸³ which is non-binding. Although at least certain aspects of intellectual property are clearly protected as a fundamental human right under international law, it is still necessary to determine how intellectual property law and human rights law should interact, since it is an area that is still unclear. The implications of protecting certain intellectual property aspects under human rights law still need to be thoroughly analysed and a human rights framework for intellectual property has to be developed. Although some groundwork has already been done for the creation of such a framework, there are still many unanswered questions. The groundwork for such a framework as well as the remaining questions will be discussed in the

⁷³ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁷⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

⁷⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁷⁶ Article 27(2) of the United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁷⁷ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 109.

⁷⁸ Dean OH 'The case for the recognition of intellectual property in the bill of rights' (1997) 60 *THRHR* 105-119 at 109.

⁷⁹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

⁸⁰ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁸¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

⁸² Article 15 (c) of the United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

⁸³ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

next section. Such a framework would also provide South African courts with much needed guidance regarding the interaction between intellectual property rights and human rights.

6 4 2 Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR

Article 27(2) of the Universal Declaration of Human Rights (UDHR)⁸⁴ and article 15(1) (c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁵ are the two provisions generally identified as the ‘internationally recognized basis of the right to the protection of interests in intellectual creations’.⁸⁶ Yu⁸⁷ stresses the importance of the drafting history of article 27(2) of the UDHR⁸⁸ and article 15(1) (c) of the ICESCR,⁸⁹ since important lessons may be learnt that may be useful in the development of a human rights framework for intellectual property. It becomes apparent that controversy surrounded the protection of moral and material interests in intellectual creations. Since a textual analysis often leaves unanswered questions, it is important to turn to the drafting history for guidance. By analysing the drafting history, the intentions and challenges that faced the drafters become apparent. It is also important to remember that the right to the protection of moral and material interests was not automatically included and that the United States of America opposed this right during the drafting of the UDHR⁹⁰ as well as the ICESCR.⁹¹ The drafting history also gives insight into the conflict that could possibly exist between human rights and intellectual property rights and could also give an idea as to the challenges that may be encountered during the development of a human rights framework for intellectual property.⁹²

⁸⁴ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) article 27(2) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁸⁵ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

⁸⁶ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1044. See Coombe RJ ‘Intellectual property, human rights and sovereignty: New dilemmas in international law posed by the recognition of indigenous knowledge and the conservation of biodiversity’ (1998-1999) 6 *Ind J Global LS* 59-115 at 59, where she also states that ‘[t]he Universal Declaration of Human Rights (UDHR) is the most general embodiment of today’s international human rights norms’.

⁸⁷ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1044.

⁸⁸ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) article 27(2) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁸⁹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

⁹⁰ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) article 27(2) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁹¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1)(c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

⁹² Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1050.

The UDHR⁹³ was adopted in 1948 and ‘created against the backdrop of aggression and atrocities committed during World War II’.⁹⁴ This motivated the framers of the Declaration to protect specific human rights and this background was often discussed, although the Declaration does not mention the discussion explicitly. The drafting of the declaration went through seven stages and initially there was strong opposition to the protection of rights in intellectual creations. During the drafting of the UDHR,⁹⁵ the United States of America was not a member of the Berne Convention,⁹⁶ since this convention offered higher standards of protection for economic and cultural intellectual property rights than what the United States of America was willing to afford. Eventually article 27(2) was adopted, although it remains unclear why it was ultimately agreed to. It may be because states wanted protection for moral rights or it could have been to internationalise copyright law.⁹⁷ Another view is that this step was seen as a way to promote freedom of expression.⁹⁸ Whatever the motivation may be, article 27(2) of the UDHR⁹⁹ now protects the moral and material interests in intellectual creations explicitly.¹⁰⁰

When the drafting of the ICESCR¹⁰¹ began, there was uncertainty as to whether this document should take the form of a covenant or a declaration. At first, a declaration which included only civil and political rights was drafted. Thereafter, the Commission of Human Rights included economic, social and political rights upon instruction of the United Nations Economic and Social Council. A year later, these provisions were split into the International

⁹³ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁹⁴ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1050. Also see Coombe RJ ‘Intellectual property, human rights and sovereignty: New dilemmas in international law posed by the recognition of indigenous knowledge and the conservation of biodiversity’ (1998-1999) 6 *Ind J Global LS* 59-115 at 60-62.

⁹⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

⁹⁶ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (September 9, 1886) (http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (accessed 17 September 2009)).

⁹⁷ See Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1058.

⁹⁸ See Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1050-1058 for a more comprehensive discussion of the drafting history of article 27(2) of the UDHR.

⁹⁹ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁰⁰ See Torremans PLC ‘Symposium: The international intellectual property regime complex: Is copyright a human right?’ (2007) 2007 *Mich St LR* 271-291 at 275-278, where he examines the origins of the UDHR and more specifically article 27(2).

¹⁰¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

Covenant on Civil and Political Rights (ICCPR)¹⁰² and the ICESCR.¹⁰³ Even though the language of the ICESCR¹⁰⁴ is closely related to that of the UDHR,¹⁰⁵ it was far from certain that article 15(1) (c) would be included automatically. Initially only the French delegate argued in favour of the protection of rights in intellectual creations and the clause was subsequently omitted from the draft, since the other delegates were not enthusiastic about such a provision. Various arguments for and against the protection of moral and material interests in intellectual property were brought to the discussion and similarly a range of versions of the article was introduced and rejected.¹⁰⁶

It was only after the Universal Copyright Convention¹⁰⁷ had entered into effect and the United States of America had joined the international intellectual property law ‘family’, that the article protecting the moral and material interests of intellectual property was reintroduced successfully. This Convention allowed the United States of America to provide lower international intellectual property protection without members of the Berne Convention¹⁰⁸ having to lower their standards of intellectual property protection. Most of the countries that had initially opposed the provision eventually supported it, with the remaining opposition being from the Eastern bloc countries. The reason for remaining opposition was that countries felt unable to assume the obligation to progressively realise the rights of authors. In the end the provision was adopted with thirty-nine votes to nine, with twenty-four abstentions.¹⁰⁹

¹⁰² United Nations *International Covenant on Civil and Political Rights* (Dec 16, 1966) 999 UNTS 171 (1976), entered into force Mar 23, 1976 (<http://www2.ohchr.org/english/law/ccpr.htm> (accessed 17 September 2009)).

¹⁰³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁰⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁰⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁰⁶ See Torremans PLC ‘Symposium: The international intellectual property regime complex: Is copyright a human right?’ (2007) 2007 *Mich St LR* 271-291 at 278-281 for a recounting of the history of the ICESCR’s drafting.

¹⁰⁷ United Nations *Universal Copyright Convention* (Sept 6, 1952) (http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html) accessed 30 November 2009).

¹⁰⁸ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (September 9, 1886) (http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (accessed 17 September 2009)).

¹⁰⁹ See Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1059-1069 for a fuller discussion of the drafting history of article 15(1)(c).

Yu¹¹⁰ argues that important lessons may be learnt from these drafting histories. In the first instance, ‘the right to the protection of interests in intellectual property has always been controversial’.¹¹¹ Some delegates found that this right should not be protected as a human right, while others reasoned that the right to own property or the right to remuneration for work already adequately covers the protection of intellectual property interests. As a result, considerable debate was necessary before article 27(2) of the UDHR¹¹² and article 15(1) (c) of the ICESCR¹¹³ were included. The second important aspect is that the *realpolitik* of international negotiations is present even for the protection of fundamental rights. Human rights are not universal and unchanging, but may vary under specific economic, social or political circumstances. In the case of article 15(1) (c) of the ICESCR,¹¹⁴ the right was eventually included due to the successful conclusion of the Universal Copyright Convention, which was a political issue.¹¹⁵ A third important lesson is that the instruments do not demarcate the scope of the right to the protection of interests in intellectual property; neither do they endorse any particular method of protection. Furthermore, no common purpose has been agreed upon, since states voted for specific provisions based on different considerations.

A fourth aspect pertains to the fact that most of the discussion preceding the adoption of the intellectual property provisions was spent on whether rights in intellectual property creations should be included under an instrument dealing with fundamental human rights. Subsequently, the important question of a suitable balance between public and private rights pertaining to intellectual property did not receive adequate attention at the drafting stage. The final important aspect to consider is that the relationship between human rights and intellectual property rights was already explored during the drafting of the UDHR¹¹⁶ and the ICESCR.¹¹⁷ Delegates raised important questions that are currently still valid, such as

¹¹⁰ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1070-1075.

¹¹¹ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1070.

¹¹² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹¹³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹¹⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹¹⁵ United Nations *Universal Copyright Convention* (Sept, 6 1952) (http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html) accessed 30 November 2009).

¹¹⁶ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹¹⁷ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

questions regarding the human rights basis for intellectual property rights; and the economic, social and cultural implications for intellectual property rights. Only recently have these questions begun to be addressed by the human rights forum, which is ‘partly in response to challenges created by the digital revolution and the implementation of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS)¹¹⁸ and partly because of an increasing focus on the rights of indigenous peoples’.¹¹⁹

Similarly to Yu’s¹²⁰ analysis, Torremans¹²¹ also notes four important aspects that become apparent from a review of the drafting histories of the UDHR¹²² and the ICESCR.¹²³ He agrees with Yu that the inclusion of copyright in the international human rights instruments is controversial. The second observation is that the rights of authors and creators should be understood as a precondition for the existence of cultural freedom and participation in; as well as access to scientific progress. The fact that these rights may also stand alone should be seen as a secondary point. In the third instance, Torremans¹²⁴ remarks that the rights of authors and creators should facilitate other rights such as the right to cultural participation and access to the products of scientific progress. The fourth observation is that international human rights instruments do not specify how intellectual property rights should be dealt with, but instead leaves this to the legislature to determine. All of the issues mentioned by these authors are also relevant in the South African context, since courts are required to deliberate the interaction between intellectual property rights and human rights; and the legislature has to give effect to a balanced approach between private and public rights in the area of intellectual property law.

¹¹⁸ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994 (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

¹¹⁹ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1075. Also see Helfer LR ‘Human rights and intellectual property: Conflict or coexistence?’ (2003) 5 *Minn Intell Prop R* 47-61.

¹²⁰ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1070-1075.

¹²¹ Torremans PLC ‘Symposium: The international intellectual property regime complex: Is copyright a human right?’ (2007) 2007 *Mich St LR* 271-291 at 280.

¹²² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹²³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹²⁴ Torremans PLC ‘Symposium: The international intellectual property regime complex: Is copyright a human right?’ (2007) 2007 *Mich St LR* 271-291 at 280.

6 4 3 International Human Rights Protection for Intellectual Property

In his article on intellectual property and human rights, Yu¹²⁵ names two approaches used by policymakers, international bureaucrats, scholars, intergovernmental organisations and nongovernmental organisations in their examination of the interaction between human rights and intellectual property. These approaches are the ‘conflict approach’, which views the two sets of rights as being fundamentally in conflict; and on the other hand the ‘coexistence approach’, which holds that the two sets of rights are in essence compatible.¹²⁶ In the opinion of Helfer, these two approaches are based on ‘radically different normative foundations and they offer divergent prescriptions for how to structure the rights and obligations of nation states and private parties’.¹²⁷

The conflict approach holds that strong intellectual property rights undermine human rights and are therefore incompatible with states’ human rights obligations, especially where economic, social and cultural rights are relevant. Proponents of this approach prescribe the normative primacy of human rights over intellectual property law in instances where rights protected in treaties may be in conflict.¹²⁸ The coexistence approach, on the other hand, views both intellectual property law and human rights law as being concerned with determining the correct balance between private monopoly rights which serve as an incentive; and access of the consuming public to creative works. In accordance with this approach, intellectual property law and human rights law are essentially compatible, although there is often disagreement over where the balance should be found between incentives and access.¹²⁹ Torremans¹³⁰ agrees that there is a need to balance public and private interests in the context of intellectual property rights.

¹²⁵ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 709.

¹²⁶ Helfer first identified these approaches. See Helfer LR ‘Human rights and intellectual property: Conflict or coexistence?’ (2003) 5 *Minn Intell Prop R* 47-61.

¹²⁷ Helfer LR ‘Human rights and intellectual property: Conflict or coexistence?’ (2003) 5 *Minn Intell Prop R* 47-61 at 48.

¹²⁸ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 709. Helfer first identified these approaches. See Helfer LR ‘Human rights and intellectual property: Conflict or coexistence?’ (2003) 5 *Minn Intell Prop R* 47-61.

¹²⁹ Helfer LR ‘Human rights and intellectual property: Conflict or coexistence?’ (2003) 5 *Minn Intell Prop R* 47-61 at 48-49. Also see Torremans PLC ‘Symposium: The international intellectual property regime complex: Is copyright a human right?’ (2007) 2007 *Mich St LR* 271-291 at 272-274, where he explains the conflict approach and coexistence approach by specifically applying them to copyright law.

¹³⁰ Torremans PLC ‘Symposium: The international intellectual property regime complex: Is copyright a human right?’ (2007) 2007 *Mich St LR* 271-291 at 281-282.

Helfer¹³¹ submits that the debate between proponents of the two approaches is unlikely to end soon. He notes four consequences that such continued tension between the two frameworks could have for the international legal system. The first consequence is that there would be a raised incentive to develop soft law human rights norms. In order to apply the human rights primacy over intellectual property protection rules, it is essential to know which human rights are being undermined and this is not always possible to determine from treaty texts alone. Proponents of the conflict approach would pressure human rights bodies to develop interpretations that would give clarity over the ambiguous human rights in order for these rights to compete with the rules of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹³² which are more clearly defined. This could also speed up the process by which the jurisprudence of economic, cultural and social rights evolves in this currently underdeveloped area of human rights law. A second consequence relates to intellectual property product consumers, who would be treated as the holders of internationally guaranteed rights. Where TRIPS¹³³ is concerned, the only holders of rights are the owners of the intellectual property products and people who consume the products are merely users. These users are granted a status equal to owners in terms of a human rights approach to intellectual property.

A third paradigm shift caused by this conflict between the two approaches relates to the ‘maximum standards’ of intellectual property protection which may be used in a human rights approach to intellectual property. ‘Minimum standards’ of protection are used in treaties such as the Berne Convention,¹³⁴ the Paris Convention¹³⁵ and TRIPS¹³⁶ that do not prevent states parties from enacting more stringent intellectual property protection measures. Whether such a ‘maximum standard’ of intellectual property protection would actually emerge would depend on how human rights norms are received by forums such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) that are

¹³¹ Helfer LR ‘Human rights and intellectual property: Conflict or coexistence?’ (2003) 5 *Minn Intell Prop R* 47-61 at 57-61.

¹³² World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994. (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

¹³³ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994. (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

¹³⁴ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (September 9, 1886) (http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (accessed 17 September 2009)).

¹³⁵ World Intellectual Property Organisation *Paris Convention for the Protection of Industrial Property* (March 10, 1883) (http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (accessed 17 September 2009)).

¹³⁶ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994. (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

established as intellectual property lawmakers. This is also the final consequence of the tension between the conflict approach and the coexistence approach. Helfer¹³⁷ states that it is much more uncertain how and if human rights would be integrated into the WTO.

Yu¹³⁸ mentions *Resolution 2000/7* of the United Nations Sub-Commission on the Promotion and Protection of Human Rights as an example of the conflict approach being followed. The Sub-Commission stated that the implementation of TRIPS¹³⁹ actually or potentially conflicted with the realisation of economic, social and cultural rights since it prevented the transfer of technology to developing countries, affected the enjoyment of the right to food and reduced communities' control over their genetic and natural resources.¹⁴⁰ The Sub-Commission reminded states that human rights should enjoy primacy over economic policies and agreements. By contrast, the coexistence approach was utilised by the WTO, which noted that international trade agreements have built-in flexibilities that allow states to balance human rights protection and intellectual property protection.¹⁴¹

Yu states that while both of these approaches have merits as well as disadvantages, neither addresses 'the fact that some attributes of intellectual property rights are protected in international or regional human rights instruments while other attributes do not have any human rights basis at all'.¹⁴² He argues that the most important task is to distinguish the human rights attributes of intellectual property from the aspects of intellectual property protection that have no human rights attributes. Yu also suggests that it may be useful to distinguish between the so-called 'intellectual property rights' and the human rights aspects

¹³⁷ Helfer LR 'Human rights and intellectual property: Conflict or coexistence?' (2003) 5 *Minn Intell Prop R* 47-61 at 60.

¹³⁸ Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1076-1077.

¹³⁹ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994. (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

¹⁴⁰ United Nations Economic and Social Council [ECOSOC] Sub-Commission on Promotion & Protection of Human Rights, Intellectual Property Rights and Human Rights *Resolution 2000/7* (Aug 17, 2000) UN Doc E/CN4/Sub2/RES/2000/7

(<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> (accessed 25 November 2009)).

¹⁴¹ Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1077. See World Trade Organization *Protection of Intellectual Property Under the TRIPS Agreement* P 9 E/C12/2000/18 (Nov 27, 2002) (<http://www.unhchr.ch/tbs/doc.nsf/0/292864197888d603c12569ba00543291?Opendocument> (accessed 30 November 2009)).

¹⁴² Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 710-711. Also see Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1077-1078.

of intellectual property by referring to these as ‘the right to the protection of interests in intellectual creations’ in the context of human rights.¹⁴³ The conflict and coexistence approaches encourage focusing on specific situations and problems, which hinders a more general discussion of the rights involved and the interaction between human rights and intellectual property rights. Since the Universal Declaration of Human Rights (UDHR)¹⁴⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴⁵ now expressly include the protection of interests in intellectual creations, Yu sees it as misleading to enquire whether human rights and intellectual property rights coexist or conflict. Due to the overlap of human rights attributes, these rights coexist and conflict with one another at the same time.¹⁴⁶

In Yu’s¹⁴⁷ opinion, it is more important to resolve the tension between the human rights aspects of intellectual property and the non-human rights aspects in the development of a human rights framework for intellectual property. There are two different sets of conflicts, namely internal conflicts that exist only within the human rights regime; and external conflicts that exist at the intersection between human rights and intellectual property. When addressing the external conflicts, it becomes important to distinguish between the human rights and non-human rights aspects of intellectual property. These non-human rights aspects of intellectual property refer to intellectual property rights, which include patents, copyright, trademarks, trade secrets and other existing as well as newly created rights.¹⁴⁸ Once the different aspects have been separated, it should be possible to resolve the conflicts with the use of human rights primacy. This approach entails protecting human rights attributes above

¹⁴³ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 711. Helfer refers to these human rights aspects of intellectual property as authors’ rights in his article on human rights and intellectual property: Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020. Throughout this dissertation I have similarly referred to this aspect as ‘the right to hold intellectual property rights’.

¹⁴⁴ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁴⁵ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁴⁶ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1077-1078.

¹⁴⁷ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 711. Also see Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1078.

¹⁴⁸ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1079.

rights that have no human rights basis.¹⁴⁹ Yu explains the principle of human rights primacy as follows:

‘Once the human rights attributes of intellectual property rights have been identified, the principle of human rights primacy will require that the protection of these attributes take precedence over the protection offered under the current intellectual property system, including the protection of the non-human-rights attributes of intellectual property rights and those forms of intellectual property rights that have no human rights basis.’¹⁵⁰

The remaining question is whether the built-in flexibilities of the intellectual property system would allow states to balance their human rights obligations with the non-human rights attributes of intellectual property and whether adequate protection is afforded to the human rights attributes of intellectual property.¹⁵¹

However, this approach does not resolve all conflicts, especially in cases where the human right in question is not precisely defined.¹⁵² Therefore Yu¹⁵³ cautions that the principle of human rights primacy should not be abused to bring existing intellectual property rights into disrepute. He acknowledges that the expansion of intellectual property rights is a distressing trend and that affording intellectual property rights the status of a human right may promote the argument for further extensions of intellectual property rights. However, he advises that the balance would not be corrected by restricting intellectual property rights unjustly in terms of other human rights. The reason for this is that the non-human rights attributes of intellectual property would be deemed subordinate to human rights in terms of the principle of human rights primacy, but the many important interests protected by those attributes need to be examined with care before coming to any conclusions about restricting the non-human rights attributes of intellectual property.

¹⁴⁹ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 710-711. Also see Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1092.

¹⁵⁰ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1092.

¹⁵¹ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1093-1094.

¹⁵² Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 710-711.

¹⁵³ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 712.

As Yu¹⁵⁴ explains, the principle of human rights primacy is not useful in the case of internal conflicts, since the conflicting rights both have a human rights basis. For example, this would be the case where the right to freedom of expression comes into conflict with the right to the protection of interests in intellectual creations.¹⁵⁵ In such a case, other approaches such as the just remuneration approach; the core minimum approach; and the progressive realisation approach may prove to be more useful. The just remuneration approach postulates that authors and inventors hold a right to remuneration rather than a right to exclusive control; and individuals wishing to use the intellectual work would obtain a human rights-based compulsory license instead of a free license.¹⁵⁶ The core minimum approach refers to the minimum essential levels of protection that a state has to provide in order to comply with human rights obligations. This approach entails a balance between the obligations of a state and the constraints imposed by a scarcity of economic and natural resources.¹⁵⁷ The progressive realisation approach refers to the fact that certain human rights are empowerment rights that enable individuals to benefit from other important rights.¹⁵⁸

It is important to note that the German Federal Constitutional Court has utilised the just remuneration approach.¹⁵⁹ In accordance with the Court's implementation of the just remuneration approach, the legislature is allowed to remove the exclusivity of copyright under certain circumstances where there is a compelling reason as long as authors receive

¹⁵⁴ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 712.

¹⁵⁵ Also see Torremans PLC 'Symposium: The international intellectual property regime complex: Is copyright a human right?' (2007) 2007 *Mich St LR* 271-291 at 287-289, where he explores the relationship between the human rights aspects of copyright and other human rights. He states that the aim of balancing the different rights should be to respect both rights. He submits that the human rights protection for copyright should be more stringent in cases where the input level of creativity was higher.

¹⁵⁶ See Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1095-1105 for a full discussion of the just remuneration approach.

¹⁵⁷ See Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1106-1113 for a full discussion of the core minimum approach.

¹⁵⁸ See Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1113-1123 for a full discussion of the progressive realisation approach.

¹⁵⁹ See Chap 5 (Immaterial Property Interests in the Constitution) sec 5.3.2 for a discussion of the German constitutional property cases pertaining to intellectual property. The German Constitutional Court also developed a balancing test, outside of intellectual property law, that reflects a distinction between human and economic interests and between conflicting rights. See Van der Walt AJ *Constitutional Property Clauses* (1999) 158-163.

adequate remuneration for the exempted use.¹⁶⁰ Although the just remuneration approach provides a good solution in instances where there is conflict between two human rights, there are also some disadvantages. In instances where the remuneration level is too high, access to intellectual property materials may still be hindered. Therefore states need to facilitate human rights-based compulsory licenses as well as legislation that prevents that prices be set too high if human rights are to be protected adequately.¹⁶¹ Another problem with the just remuneration approach is that the focus falls on material interests, ignoring the moral interests in intellectual property creations, which are also important interests. Furthermore, it is also ineffective in addressing problems related to the protection of traditional knowledge and intellectual creations stemming from such knowledge.¹⁶²

The core minimum approach was specifically created for the ICESCR¹⁶³ for determining whether a state has fulfilled its obligations relating to economic, social and cultural rights as far as its resources allow. In agreement with this approach, states would still be compliant with the ICESCR¹⁶⁴ if they modified or removed protection in terms of international treaties such as TRIPS¹⁶⁵ that are in excess of the protection of moral and material interests in intellectual property required by the ICESCR.¹⁶⁶ Excess protection may also be removed if this is compelled by the competing demands of other human rights.¹⁶⁷ This approach provides authors with a minimum level of protection even where other human rights demand a state's resources. However, there are also limitations to this approach. In the first instance, it is difficult to determine how much protection would satisfy the core minimum requirement. This approach does not provide guidance as to how rights could be progressively realised as resources become available either, since it only focuses on one right at a time, nor does it

¹⁶⁰ See *BVerfGE* 31, 248 [1971] (Broadcast Lending case); *BVerfGE* 31, 270 [1971] (School Broadcast case); *BVerfGE* 31, 255 [1971] (Tape Recording I case); *BVerfGE* 31, 275 [1971] (Phonograph Record case); *BVerfGE* 49, 415 [1978] (Church Music case).

¹⁶¹ Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1100-1101.

¹⁶² Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1102-1104. See Chapter 3 (Unconventional Immaterial Property Interests) sec 3.7 for a discussion of traditional knowledge.

¹⁶³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁶⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁶⁵ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994. (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

¹⁶⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁶⁷ Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149 at 1106.

dictate the maximum protection for intellectual property creations, which becomes important when the intellectual property system interferes with other human rights. Finally, it does not attempt to explore the relationship between different provisions in human rights instruments. This is problematic, since it is possible that the core minimum rights could be perceived as the ceiling for protection instead of the lowest level of protection permissible.¹⁶⁸

In *Government of the Republic of South Africa v Grootboom (Grootboom)*,¹⁶⁹ the use of the minimum core rights approach was argued in a South African constitutional case. This case concerned extremely poor persons who felt compelled to move onto vacant, but privately owned land that was meant for formal low-cost housing. The people were evicted and their possessions destroyed. The Constitutional Court had to interpret 26 (the right to adequate housing) and section 28(1) (c). It was argued before the court that guidance for the interpretation of these rights should be found in the ICESCR¹⁷⁰ and the General Comments from the United Nations Committee, General Comment 3¹⁷¹ and 4¹⁷² in particular. General Comment 3 states that

‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant ... Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’.¹⁷³

¹⁶⁸ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1107-1113.

¹⁶⁹ 2001 (1) SA 46 (CC). See Bilchitz D Poverty and Fundamental Rights – The Justification and Enforcement of Socio-Economic Rights (2007) 139-141 for a brief discussion of the case.

¹⁷⁰ United Nations International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁷¹ United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No 3: The Nature of States Parties Obligations Art 2(1)* (Dec 14, 1990)

(<http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument> (accessed 10 April 2010)).

¹⁷² United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No 4: The Right to Housing Art 11(1)* (Dec 13, 1991)

(<http://www.unhchr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e?Opendocument> (accessed 10 April 2010)).

¹⁷³ United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No 3: The Nature of States Parties Obligations Art 2(1)* (Dec 14, 1990) par 10

The *Grootboom* Court¹⁷⁴ did not reject the minimum core approach suggested by the United Nations Committee outright, but levelled several criticisms against the approach, ultimately finding it unnecessary to decide on the issue whether it would be ‘appropriate for a court to determine in the first instance the minimum core of a right’.¹⁷⁵ The Court decided that the real question is whether the steps that the state has taken to realise the fundamental right may be seen as reasonable. Therefore it appears that the South African Constitutional Court does not endorse the application of the core minimum rights approach in socio-economic rights cases.¹⁷⁶

The third approach for dealing with two conflicting human rights is the progressive realisation approach, which was designed with the UDHR¹⁷⁷ and ICESCR¹⁷⁸ as its basis. In terms of this approach, the focus falls on realising rights systematically as resources become available. The purpose of such an approach is to ‘enable individuals to progressively realize their economic, social and cultural rights by resolving the conflicts between human rights and the non-human-rights aspects of intellectual property protection’.¹⁷⁹ The question that this approach leaves unanswered is how resources should be allocated, since international treaties do not give any guidance in this regard. The most visible limitation of this approach is that it is not always possible to balance the demands of competing human rights. The South African

(<http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument> (accessed 10 April 2010)). See Bilchitz D ‘Giving Socio-economic rights teeth: The minimum core and its importance’ (2001) 119 *SALJ* 484-501, Bilchitz D ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) 19 *SAJHR* 1-26 and Bilchitz D *Poverty and Fundamental Rights – The Justification and Enforcement of Socio-Economic Rights* (2007) 139-149 for a discussion of the minimum core rights approach. Also see Liebenberg S ‘The interpretation of socio-economic rights’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 33-1 – 33-66 at 33-10 – 33-16 for a discussion of the positive and negative aspects of adopting the core minimum rights approach.

¹⁷⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁷⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 33. See Bilchitz D *Poverty and Fundamental Rights – The Justification and Enforcement of Socio-Economic Rights* (2007) 140-141. See Liebenberg S ‘The interpretation of socio-economic rights’ in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003) 33-1 – 33-66. Also see Liebenberg S *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) 148-151.

¹⁷⁶ Also see *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), where the Court claimed that adopting a core minimum rights approach would force the state to do the impossible. Also see Bilchitz D ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) 19 *SAJHR* 1-26 where he argues that this statement of the court is without substance.

¹⁷⁷ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁷⁸ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁷⁹ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1114-1115.

Constitutional Court explicitly uses the method of balancing competing rights with some success, especially with reference to socio-economic rights. For example, in the case of *Laugh It Off v SAB International*,¹⁸⁰ the court used the balancing approach in order to weigh up the right to freedom of expression and intellectual property rights in a trademark. It depends on the nature of the conflict between human rights in determining which of these three approaches would be best utilised in a specific situation and sometimes it would even be best to use a combination, since the approaches complement one another.

The first important question that should be addressed when attempting to establish a human rights framework for intellectual property is whether intellectual property rights are human rights. Yu¹⁸¹ states that there are questions about why intellectual property rights should be equated with fundamental human rights such as the right to life. There is also concern that the inclusion of intellectual property as a fundamental human right would undermine the importance of human rights. Nonetheless, the right to the protection of interests in intellectual creations has been explicitly recognised as a fundamental human right in international law by the UDHR¹⁸² and the ICESCR.¹⁸³ In terms of article 27(2) of the UDHR,¹⁸⁴ ‘[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author’.¹⁸⁵ Article 15(1) (c) of the ICESCR¹⁸⁶ mandates all parties to the Covenant to ‘recognize the right of everyone ... [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author’.¹⁸⁷

¹⁸⁰ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

¹⁸¹ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 713.

¹⁸² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁸³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁸⁴ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁸⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁸⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁸⁷ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3(1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

Another important question, on authority of Yu,¹⁸⁸ is whether all forms of intellectual property are human rights. He argues that this is not the case and that the protection of corporate trademarks is unlikely to be considered a human right under international law. Similarly, trade secrets owned by corporations do not have a human rights basis, since the employees of the corporation created the trade secrets. ‘[W]orks-made-for-hire, employee inventions, neighboring rights, database protection, data exclusivity protection, and other rights that protect the economic investment of institutional authors and inventors’¹⁸⁹ are other examples of intellectual property rights that Yu considers to be outside of the scope of human rights. He derives this conclusion from General Comment Number 17,¹⁹⁰ which is considered to be the authoritative interpretation of article 15(1) (c) of the ICESCR.¹⁹¹ In this comment, the Committee declared that

‘[h]uman rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole’.¹⁹²

However, it bears mentioning that this argument is also applicable to property in general, but property is recognised and protected as a constitutional right nevertheless, without equating it with other human rights in the strict sense. This approach allows some immaterial property interests to be described as human rights and yet others as economic or constitutional rights. Therefore the immaterial property interest on hand may be weighed up against the conflicting

¹⁸⁸ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 726.

¹⁸⁹ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 727.

¹⁹⁰ United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)* (Jan 12, 2006) 4 UN Doc E/C12/GC/17 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

¹⁹¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁹² United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)* 4 UN Doc E/C12/GC/17 (Jan 12 2006). ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

right (for example freedom of expression or the right to education) without excluding it from constitutional protection at the outset. Grosheide¹⁹³ suggests that human rights may be divided into two categories in order to solve this problem. The first category would encompass fundamental human rights, for example the prohibition of slavery. These kinds of rights are beyond state interference and open to international enforcement. The second category consists of non-fundamental human rights which may also be described as economic rights, for example the right to property. These rights would be open to state interference. Grosheide suggests that the problem of diluting fundamental human rights may be solved by placing intellectual property in the second category. It must be noted that in principle all constitutional rights may be limited and weighed up against one another, although it is true that the economic rights may be regulated more readily while certain fundamental human rights are practically non-derogable.

In a similar vein, Yu¹⁹⁴ also states that corporations cannot bring claims of violation of their right to the protection of interests in intellectual creations despite the fact that corporate intellectual property rights are growing, since these rights would not qualify as a human right. This opinion differs from the position in certain national human rights systems, where it is generally accepted that legal persons may also rely on human rights protection for their rights and specifically property rights.¹⁹⁵ The ICESCR¹⁹⁶ was drafted with individuals and communities in mind, not corporations. Yu also observes that human rights are inalienable. He argues that although individuals may have transferred rights to corporations in terms of assignment or work-for-hire arrangements, the human rights-based interest of such individuals are not transferable. Yu¹⁹⁷ mentions two arguments that corporate rights holders might bring to prove that their rights should enjoy human rights protection, although he finds these arguments weak. The first argument pertains to the fact that the intellectual property interests of these corporations were derived from the human rights-based interests of the creative individuals and that damage to the corporate interests would also risk the individual

¹⁹³ Grosheide FW 'Intellectual property and human rights – A delicate relationship' (2009) Guest Lecture, Faculty of Law, Stellenbosch University (21 October 2009) (text on file with the author)

¹⁹⁴ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 728.

¹⁹⁵ See the discussion on this aspect in Chap 5 (Immaterial Property Interests in the Constitution). In South African constitutional law it is accepted that legal persons may also invoke human rights protection for their rights insofar as it is applicable.

¹⁹⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

¹⁹⁷ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 728-729.

interests by reducing the individual's opportunities and the remuneration they receive. The second argument holds that corporate rights holders' rights should be strongly protected because they are seeking protection on behalf of the individual shareholders of the human rights-based property interests in their investments.

Yu¹⁹⁸ submits that even if these arguments were to be accepted, it is unlikely that a human rights violation would result from the decrease in opportunities and remuneration. Although corporate actors may have the standing to bring human rights claims, they may not claim that their 'human' rights were violated. This distinction is important to ensure that corporate intellectual property rights are not propelled upwards through an association with human rights. In South African constitutional law it is accepted that juristic persons' rights may also be protected by the Constitution as far as it is applicable. The Constitutional Court confirmed the principle that not only natural persons, but also juristic persons may be the beneficiaries of section 25 protection in the *FNB* case.¹⁹⁹ According to Article 19.3 of the Basic Law for the Republic of Germany 1949, fundamental rights do not apply only to natural persons, but to domestic juristic persons as well, as far as the nature of the right permits.²⁰⁰ In Irish law, corporate bodies are also entitled to constitutional protection for their property.²⁰¹ Therefore Yu's argument that juristic persons are excluded from constitutional protection does not really convince, unless what he means is that the rights of juristic persons may be protected, although they should be viewed as economic constitutional rights rather than fundamental human rights.

It would be correct to say that a juristic person's economic rights may have been violated and where that right and another constitutional right conflicts, it will bear some weight in the weighing up process. The German Federal Constitutional Court uses a scaling approach in terms of which constitutional rights are protected stronger if they are more closely connected to the human individual, but weaker if the interest is purely economic. In other words, human or personal rights such as the rights to liberty and dignity would be protected more strongly than economic interests such as property rights.²⁰² In German law, the property clause

¹⁹⁸ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 729-730.

¹⁹⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 41-45.

²⁰⁰ See Van der Walt AJ *Constitutional Property Clauses* (1999) 126.

²⁰¹ See *Iarnród Éireann v Ireland* [1996] 3 IR 321, [1995] 2 ILRM 161.

²⁰² See Van der Walt AJ *Constitutional Property Clauses* (1999) 124-125.

(Article 14) ‘is a fundamental (human) right which is meant to secure, for the holder of the property, an area of personal liberty in the patrimonial sphere, to enable her to take responsibility for the free development and organization of her own life within the larger social and legal context’.²⁰³ As a result,

‘the property guarantee is primarily a guarantee for the protection of personal liberty and not for the protection of property as such. The guarantee of personal liberty in the patrimonial sphere is therefore said to form the foundation for the secondary guarantee of rights, which entails that all valuable patrimonial rights and interests (*vermögenswerte Positionen*) are recognized and protected in terms of (inter alia) the property guarantee’.²⁰⁴

For example, my right to the house in which I live is protected stronger than my right to the house that I rent out for profit.

Mostert explains the theory of *Güterabwägung* or ‘abstract ranking’ of rights and values as follows:

‘According to this hierarchy [of fundamental rights], individual freedom would, for instance, rank higher than property rights and other rights which protect objects, because individual freedom is inextricably connected to the person. Furthermore, the importance of a right depends, inter alia, on its relevance to the community, which in turn links with the importance of individual freedom. This theory basically foresees that the more fundamental a right is for the maintenance of values in a democratic state, the higher its position in this pyramid of fundamental rights will be. Freedom of expression or occupational freedom would, for instance, rank higher than property rights.’²⁰⁵

Alexander views the German scaling approach as an illustration of ‘another aspect of the Federal Constitutional Court’s implementation of the social-obligation norm’.²⁰⁶

The question whether intellectual creations already receive adequate protection under the right to private property is another important question in the context of international intellectual property protection.²⁰⁷ Although the modern-day tendency is to consider

²⁰³ See Van der Walt AJ *Constitutional Property Clauses* (1999) 124.

²⁰⁴ Van der Walt AJ *Constitutional Property Clauses* (1999) 124-125. See *BVerfGE* 24, 367 [1968] (Deichordnung case) 400. Also see Alexander GS *The Global Debate over Constitutional Property* (2006) 139 and Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2000) 292-296.

²⁰⁵ Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2000) 293-294.

²⁰⁶ Alexander GS *The Global Debate over Constitutional Property* (2006) 139.

²⁰⁷ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 731.

intellectual property as private property, international human rights instruments do not reject or endorse this tendency to protect intellectual property interests in terms of property rights. As an alternative, the human rights instruments simply distinguish between moral and material interests, the two separate interests covered by the right to the protection of interests in intellectual creations. A moral interest ‘safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage’ and is generally considered to fall outside the scope of private property. A material interest, on the other hand, ‘enable[s] authors to enjoy an adequate standard of living’.²⁰⁸

Moral interests traditionally offered in continental Europe include the right of attribution,²⁰⁹ the right of integrity,²¹⁰ the right of disclosure²¹¹ and the right of withdrawal.²¹² As per the CESCR, the intention in granting moral rights was to

‘proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations ... “moral interests” in article 15, paragraph 1 (c), include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions, which would be prejudicial to their honour and reputation’.²¹³

²⁰⁸ United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)* 4 UN Doc E/C12/GC/17 (Jan 12 2006) ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

²⁰⁹ The right of attribution refers to the right to claim authorship of the protected work. In South African copyright law, this right exists in the form of a paternity right. See Chap 2 sec 2.4 for a discussion of this aspect.

²¹⁰ The right of integrity grants the ‘right to prevent the distortion, mutilation, or other modification of the work in a manner prejudicial to the author’s honor or reputation’: Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1081 fn 166. In South African copyright law, a similar right of integrity is granted to the author of a copyrighted work. See Chap 2 (Traditional Immaterial Property Interests) and sec 2.4 in particular.

²¹¹ The right of disclosure allows the author to ‘determine when the work is ready for public dissemination and in what form the work will be disseminated’. Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1081 fn 166. This right does not exist in South African copyright law. See Chap 2 (Traditional Immaterial Property Interests) and sec 2.4 in particular.

²¹² In terms of the right to withdrawal, an author may choose to withdraw a work from public dissemination: Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1081 fn 166. In South African copyright law, no such right exists. See Chap 2 (Traditional Immaterial Property Interests) and sec 2.4 in particular.

²¹³ United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material*

In the opinion of Yu,²¹⁴ a strong case can be made that these two rights identified by the CESCR constitute the minimum levels of protection for the moral interests in intellectual creations that states are required to afford authors.

Yu²¹⁵ states that on its face value, the phrase ‘material interests’ appears to encompass all the forms of economic interests that the right to private property normally protects. However, upon closer inspection the phrase appears to cover a narrower type of economic interest than those usually protected under the right to private property, especially considering the drafting history of the phrase. The right to material interests does not cover all forms of economic interests that are protected in the existing intellectual property system. This right rather protects the limited interests of authors to acquire just remuneration for their intellectual labour. Yu²¹⁶ also notes that the right to private property is not protected under either the ICCPR²¹⁷ or the ICESCR²¹⁸ and he attributes this to cold-war politics and concerns raised by Socialist countries. It is uncertain whether countries would agree to a right to private property now. Yu interprets this tendency to mean that the delegates agreed upon a special exception for property rights in intellectual creations. He argues that the right to hold intellectual property should be considered a right separate from property rights.²¹⁹

Although article 17 of the UDHR²²⁰ protects the right to own property, it is the right to own property ‘alone as well as in association with others’ and not private property that is

Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant) 4 UN Doc E/C12/GC/17 (Jan 12 2006) par 12, 13 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

²¹⁴ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1083.

²¹⁵ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 731-732. Also see Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1084.

²¹⁶ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 733. Also see Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1083-1092, where the concept of material interests and its background is discussed in full.

²¹⁷ United Nations *International Covenant on Civil and Political Rights* (Dec 16, 1966) 999 UNTS 171 (1976), entered into force Mar 23, 1976 (<http://www2.ohchr.org/english/law/ccpr.htm> (accessed 17 September 2009)).

²¹⁸ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

²¹⁹ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 733.

²²⁰ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²²⁰ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

protected. This leads to the inference that there is also a compelling textual basis for the creation of a rich public domain. This conception of the public domain as unrestricted access to protected materials contrasts with the idea that the public domain consists merely of materials that are not protected by a property right for some or other reason.²²¹ Yu argues that article 17 of the UDHR²²² is ambiguous on the subject of whether property rights form the basis for the protection of material interests in intellectual creations, since article 17 has the dual purpose of protecting property and promoting the public domain. The drafting history appears to suggest that article 17 should not form the basis, since countries are free to decide whether they want to promote strong intellectual property rights or a rich public domain.

As suggested by Yu, the international human right to

‘the protection of interests in intellectual creations ... covers only the protection of sufficient intellectual property-based interests: it does not include the protection of additional interests that are generally not required to meet the essential needs of decent living or to maintain human dignity’.²²³

There is no requirement that the term of protection of material interests should span over the entire lifetime of a creator. It would also be perfectly acceptable to grant a creator an adequate standard of living by means of one-time payments, or by granting the creator an exclusive right for a limited period of time only to exploit his or her creative work.²²⁴ As claimed by Yu,²²⁵ the question that one has to ask in determining whether the obligation of material interests protection is fulfilled by states is not whether protection is offered by the property rights system or by international intellectual property agreements, but rather whether the system currently in place does in fact provide adequate protection for material interests in

²²¹ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 734.

²²² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²²³ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 735.

²²⁴ United Nations *Economic and Social Council Comment on Economic, Social & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)* 4 UN Doc E/C12/GC/17 (Jan 12 2006) ([http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)). Also see Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1088-1092.

²²⁵ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1089.

intellectual creations. This suggests that the South African constitutional right to property may be utilised in order to protect the human rights aspects of intellectual property.

The next question relating to a human rights framework for intellectual property is whether such a framework will strengthen existing intellectual property protection. This is a particularly important question and a great concern among scholars opposing the expansion of intellectual property rights. Yu supposes that ‘an emphasis on the human rights attributes of intellectual property rights is likely to strengthen intellectual property rights, especially in civil law countries where judges are more likely to uphold rights that are considered human rights’.²²⁶ He notes concerns that this would aggravate the imbalance between intellectual property rights and the public domain and that it would ultimately have undesired results for proponents of the public domain who wish to use the human rights framework to promote the public domain and set limits for the protection of intellectual property rights. However, he also points out that international human rights instruments give human rights recognition only to certain attributes of intellectual property rights. The other, non-human rights attributes are not protected.²²⁷ There is still the danger that all intellectual property rights may be elevated to the status of human rights in rhetoric even if it is not the case in practice.

However, Yu²²⁸ cautions that the correct approach would not be to deny that intellectual property does have certain human rights attributes, but to establish which attributes do have human rights qualities and which ones do not. Once again, the German scaling approach may be useful where constitutional balancing is required in case of conflicting constitutional rights. In terms of this approach, even recognised property (including immaterial property) interests in the same object could deserve different levels of protection according to whether the interest is fundamental or merely economic (what Yu calls rights with human rights attributes and rights without such attributes). For example, the rights to moral interests and material interests in copyright could be distinguished in this way. The moral interests are more closely connected to the personality of the author of a copyrighted work and it is not possible to cede such a right to someone else; therefore this particular right could be

²²⁶ Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 738-740.

²²⁷ See Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1126-1127.

²²⁸ Yu PK ‘International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework’ (2007) 40 *UC Davis LR* 1029-1149 at 1128.

protected relatively stronger than the material interest in a work of copyright which is merely an economic interest.

Another question that is of particular importance is whether a human rights framework for intellectual property would promote the interests of indigenous peoples and traditional communities.²²⁹ Yu²³⁰ argues that indigenous groups and traditional communities were not kept in mind when the UDHR²³¹ and the ICESCR²³² were drafted. The existing intellectual property regime similarly does not provide for traditional communities.²³³ However, it is still possible to interpret article 27 of the UDHR²³⁴ and article 15(1) (c) of the ICESCR²³⁵ broadly in order to include the rights of traditional communities and indigenous groups, although the drafters may not have foreseen this extension.²³⁶ Yu notes that there is ample scope for the exploration of collective rights in international human rights instruments.

Helfer²³⁷ agrees with Yu²³⁸ that a human rights framework needs to be developed for intellectual property. Helfer states that '[t]he international intellectual property system is on the brink of a deepening crisis'.²³⁹ This crisis is caused by different parties (such as Government officials, private parties and civil society groups) taking conflicting views on a range of issues in international venues that are also on the increase. Issues include patented medicines, biodiversity, traditional knowledge, digital content and the harmonisation of procedural rules.²⁴⁰ Another problem in creating a human rights framework for intellectual property is that the textual provisions for international human rights law give only a faint

²²⁹ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 740.

²³⁰ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 740.

²³¹ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²³² United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

²³³ See Chap 3 (Unconventional Immaterial Property Interests).

²³⁴ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²³⁵ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

²³⁶ See Chap 3 (Unconventional Immaterial Property Interests) sec 3.7 for a discussion of traditional knowledge.

²³⁷ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020.

²³⁸ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753.

²³⁹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 973.

²⁴⁰ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 973.

outline as to how human rights-compliant mechanisms should be developed to promote creativity and innovation. These provisions also invite the use of human rights rhetoric both for and against the revision of protection standards for intellectual property, both in national law and treaties. Helfer cautions that using such human rights rhetoric without greater normative clarity could lead to the situation where every claim would enjoy human rights protection and therefore effectively none would enjoy such protection.²⁴¹

Furthermore, Helfer²⁴² states that questions remain regarding the relationship between the intellectual property clauses in the UDHR²⁴³ and the ICESCR²⁴⁴ as well as the interaction of these two clauses with other economic, social, civil and political rights. It also remains to be answered how international human rights rules pertaining to intellectual property would interface with international trade agreements such as TRIPS.²⁴⁵ Helfer argues that these questions and issues underscore the need for a comprehensive and coherent human rights framework to be developed. In developing such a framework, it is important to define the different characteristics of the rights that are protected by each human rights system. It must be determined whether ‘standards of conduct are legally binding or only aspirational’²⁴⁶ and whether only governments or also private parties are bound by these standards. Rules should be adopted in order to resolve inconsistencies among international and national laws and policies where these overlap.²⁴⁷ A human rights framework for intellectual property must also distinguish between a situation where international and national laws have the same goal yet different mechanisms to reach it; and a situation where there is an actual conflict of goals or values that cannot readily be reconciled. The framework must finally also incorporate an institutional dimension that takes into account ‘the diverse international and domestic

²⁴¹ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 975-176.

²⁴² Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 976-177.

²⁴³ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²⁴⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

²⁴⁵ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* of 15 April 1994. (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁴⁶ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 977.

²⁴⁷ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 977.

lawmaking and adjudicatory bodies in which states and non-state actors generate new rules, norms, and enforcement strategies'.²⁴⁸

Helfer²⁴⁹ states that it becomes apparent from the drafting history of the UDHR²⁵⁰ that the protection of authors' and inventors' rights was deliberately included, even though the precise intention of the drafters may be somewhat unclear. He states that these rights are supported in the ICESCR²⁵¹ in nearly identical language. This international convention, adopted twenty years after the UDHR,²⁵² 'makes the UDHR's²⁵³ economic and social guarantees binding as a matter of treaty law'.²⁵⁴ Helfer²⁵⁵ finds it strange that the protection of the rights of authors and inventors are not reflected in the international property system. 'Human rights' are mentioned neither in multilateral treaties such as the Paris,²⁵⁶ Berne²⁵⁷ or Rome²⁵⁸ Conventions, nor in the TRIPS²⁵⁹ agreement. Helfer proposes that the phrases 'rights', 'private rights' and 'exclusive rights' used in treaties to describe authors' rights may suggest that the objectives of the international human rights regime and the international intellectual property regime are similar. However, he cautions that these mere textual and linguistic parallels are superficial.²⁶⁰ In intellectual property treaties, the reference to rights serves merely to indicate that these treaties fall within the scope of private rather than public

²⁴⁸ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 977.

²⁴⁹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 978-979.

²⁵⁰ United Nations *Universal Declaration of Human Rights* (1948) 216 UNTS 3 (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²⁵¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

²⁵² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²⁵³ United Nations *Universal Declaration of Human Rights* (1948) 216 UNTS 3 (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

²⁵⁴ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 979.

²⁵⁵ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 979.

²⁵⁶ World Intellectual Property Organisation *Paris Convention for the Protection of Industrial Property* (March 10, 1883) (http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (accessed 17 September 2009)).

²⁵⁷ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (September 9, 1886) (http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (accessed 17 September 2009)).

²⁵⁸ World Intellectual Property Organization *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (26 Oct, 1961) 496 UNTS 43 (http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html (accessed 29 July 2010)).

²⁵⁹ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/lea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁶⁰ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 979.

international law. Use of such rights language also assists in bolstering ‘claims of intellectual property owners in foreign legal systems unfamiliar with or sceptical of the entitlements the treaties create for non-nationals’.²⁶¹

Helfer states that

‘[a]lthough the references to rights in intellectual property law and human rights law have distinct theoretical and philosophical roots, the recent expansion of the two fields has blurred these distinctions in new and unexamined ways. International relations scholars have noted the tendency of international legal regimes to expand their scope over time, creating dense “policy spaces” in which formerly unrelated sets of principles, norms, and rules increasingly overlap in incoherent and inconsistent ways. Such regime expansions are especially pronounced in international intellectual property law and international human rights law’.²⁶²

As Helfer points out,²⁶³ there were two events that caused intellectual property issues to be considered by human rights norm-creating bodies. Firstly, the neglected cultural rights of indigenous people were highlighted; and secondly, intellectual property was linked to trade via TRIPS²⁶⁴ and also by bilateral and regional so-called ‘TRIPS-plus’ treaties.²⁶⁵ From these events it became apparent that intellectual property law has serious normative deficiencies from the viewpoint of human rights law. These events furthermore led to new standard-setting initiatives, which amplified the challenges between intellectual property law and human rights law.

Of particular importance is the issue of indigenous peoples and traditional knowledge.²⁶⁶ The main problem stems from the fact that traditional knowledge was previously treated as part of the public domain ‘either because it did not meet established subject matter criteria for protection, or because the indigenous communities who created it did not endorse private

²⁶¹ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 980.

²⁶² Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 980.

²⁶³ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 982.

²⁶⁴ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁶⁵ ‘TRIPS-plus’ treaties refer to treaties that contain more stringent intellectual property protection rules than those in TRIPS, require developing countries to implement TRIPS earlier than the date specified in TRIPS or require developing countries to conform to other multilateral intellectual property agreements’ requirements. See Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 982 fn 28. Also see Helfer LR ‘Human rights and intellectual property: Conflict or coexistence?’ (2003) 5 *Minn Intell Prop Rev* 47-61 at 51-57.

²⁶⁶ See Chap 3 (Unconventional Immaterial Property Interests) sec 3.7, where the issue of traditional knowledge is discussed at length.

ownership rules'.²⁶⁷ Third parties were then able to exploit this knowledge, privatising it through patents, copyright and plant breeders' rights. Its benefits were rarely shared with the indigenous communities who initially held the traditional knowledge. United Nations (UN) human rights bodies commissioned the creation of the Draft Declaration on the Rights of Indigenous Peoples²⁶⁸ and Principles and Guidelines for the Protection of the Heritage of Indigenous People²⁶⁹ in order to close this loophole in intellectual property law in terms of which traditional knowledge is exploited. These documents identify intellectual property as one of the problems facing traditional knowledge and note only a small possibility that intellectual property could be a part of the solution. On the one hand, the documents encourage states to utilise existing intellectual property protection mechanisms to include traditional knowledge; but on the other hand caution states not to grant exclusive intellectual property rights over traditional knowledge that do not provide for the indigenous peoples to share in ownership, control, use and benefits.²⁷⁰

As Helfer states,²⁷¹ human rights and intellectual property rights also intersect where TRIPS²⁷² and 'TRIPS-plus' treaties are concerned. Relatively high minimum protection standards were adopted by TRIPS²⁷³ for all World Trade Organization (WTO) members. Members include many developing and undeveloped countries which previously had little interest in protecting intellectual property rights. What sets TRIPS²⁷⁴ apart from previous

²⁶⁷ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 982-983.

²⁶⁸ United Nations Economic and Social Council [ECOSOC] Sub-Commission on Prevention of Discrimination & Protection of Minorities *Draft Declaration on the Rights of Indigenous Peoples* (1994) UN Doc E/CN4/Sub2/1994/2/Add1.

²⁶⁹ United Nations Economic and Social Council [ECOSOC] Sub-Commission on Prevention of Discrimination & Protection of Minorities *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Social Rapporteur* UN Doc E/CN4/Sub2/1995/26, Annex 1 (June 21, 1994) (initial text draft of Principles and Guidelines); United Nations Economic and Social Council [ECOSOC] Sub-Commission on Prevention of Discrimination & Protection of Minorities *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People* (2000) UN Doc E/CN4/Sub2/2000/26 (revised text of draft Principles and Guidelines). The Sub-Commission later adopted the Revised Draft Principles and Guidelines and transmitted them to the Commission for its approval. United Nations Economic and Social Council [ECOSOC] Sub-Commission on the Promotion and Protection of Human Rights *Decision 2000/107* (2000) UN Doc E/CN4/Sub2/DEC/107/2000/107.

²⁷⁰ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 983-984.

²⁷¹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 984.

²⁷² World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁷³ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁷⁴ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

intellectual property agreements is that it ‘has teeth’.²⁷⁵ Treaty bargains may be enforced through the WTO’s dispute settlement system, which makes use of mandatory adjudication backed by the threat of trade sanctions. In 2000, the UN human rights Sub-Commission on the Protection and Promotion of Human Rights (the Sub-Commission) first turned its attention to TRIPS,²⁷⁶ adopting *Resolution 2000/7* on ‘Intellectual Property and Human Rights’.²⁷⁷ In accordance with this resolution, intellectual property protection was flawed since there were conflicts between the implementation of TRIPS²⁷⁸ and the realisation of economic, social and cultural rights. Five areas of conflict were identified, namely

‘(1) the transfer of technology in developing countries; (2) the consequences for the right to food of plant breeders’ rights and patents for genetically modified organisms; (3) biopiracy; (4) the protection of the culture of indigenous communities; and (5) the impact on the right to health of legal restrictions on access to patented pharmaceuticals’.²⁷⁹

The Sub-Commission proposed that national governments, civil society groups and intergovernmental organisations should give human rights primacy over economic policies and agreements in order to resolve the conflicts mentioned. However, this assertion was non-binding and as such had no legal force. Furthermore, the Sub-Commission did not scrutinise the relevant, binding international agreements or customary international law rules in order to determine which particular human rights TRIPS²⁸⁰ violates.²⁸¹ Helfer²⁸² observes that such studies have not provided for a detailed human rights framework for intellectual property, nor do they indicate how such a framework should interface with existing intellectual property protection mechanisms in international or national law. He does not find this omission

²⁷⁵ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 984.

²⁷⁶ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁷⁷ United Nations Economic and Social Council [ECOSOC] Sub-Commission on Promotion & Protection of Human Rights, Intellectual Property Rights and Human Rights *Resolution 2000/7* (Aug 17, 2000) UN Doc E/CN4/Sub2/RES/2000/7

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> (accessed 25 November 2009)). Also see Weissbrodt D & Schoff K ‘A human rights approach to intellectual property protection: The genesis and application of sub-commission resolution 2000/7’ (2003) 5 *Minn Intell Prop R* 1-46.

²⁷⁸ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁷⁹ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 985.

²⁸⁰ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

²⁸¹ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 986.

²⁸² Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 987.

surprising either, since the area of economic, social and cultural rights is least developed of all the human rights categories. This is also the area where human rights and intellectual property rights overlap most often. Economic, social and cultural rights have only received continued jurisprudential attention since the last decade.

The United Nations Committee on Economic, Social, and Cultural Rights (the CESCR) interpreted these rights in more detail. Functions of the CESCR include guiding member nations as to the meaning of the ICESCR²⁸³ treaty. The CESCR issues general comments that interpret specific treaty articles or human rights issues. These comments provide a standard that the CESCR may use when reviewing states' compliance with the Covenant. Such interpretations are applicable to governments, but also to individuals and other private parties whose actions are significant to social, economic and cultural rights. Governments are required to regulate such private parties in order to comply with their treaty obligations. The first interpretive comment on intellectual property was the Statement on Human Rights and Intellectual Property,²⁸⁴ which analysed the ICESCR's²⁸⁵ intellectual property provisions on a preliminary basis and set out an agenda for the CESCR to draft comments on each specific intellectual property clause of the ICESCR.²⁸⁶ The first of these general comments²⁸⁷ pertained to article 15(1) (c) of the ICESCR.²⁸⁸

²⁸³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

²⁸⁴ United Nations Economic and Social Council [ECOSOC] Commission on Economic, Social & Cultural Rights *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights* (Dec 14, 2001) UN Doc E/C12/2001/15 (<http://www.unhchr.ch/tbs/doc.nsf/0/40d009901358b0e2c1256915005090be?Opendocument> (accessed 2 December 2009)).

²⁸⁵ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

²⁸⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

²⁸⁷ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

²⁸⁸ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)). Article 15(1)(c) grants 'the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

In Helfer's²⁸⁹ opinion, these two comments, read together, form the basis for the development of a human rights framework for intellectual property. The CESCR developed a 'violations approach' for the interpretation of the covenant in which the so-called 'core obligations' or minimum essential levels for immediate implementation by states are distinguished from other obligations which only need to be progressively realised and implemented once resources become available. These core obligations consist of the particular undertakings to respect, protect and fulfil the relevant rights.²⁹⁰ The obligation to respect entails that states 'refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author'.²⁹¹ States are required to take measures preventing third parties from interfering with authors' moral and material interests in terms of the obligation to protect. The obligation to fulfil mandates states to implement 'legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1(c)'.²⁹²

Helfer²⁹³ notes that these obligations seem very similar to intellectual property law, although they are framed in human rights language. The three core obligations effectively prevent states from interfering in the moral and material interests of creators; mandate states to protect the works of creators; require states to provide for effective remedies in cases where the rights of creators are infringed by unauthorised use; and make provision for the participation of creators in decisions that affect their moral and material interests.²⁹⁴ Helfer²⁹⁵ also states that the three core obligations overlap with certain provisions in intellectual

²⁸⁹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 989-990.

²⁹⁰ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* UN Doc E/C12/GC/17 (Jan 12, 2006) ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

²⁹¹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 990.

²⁹² Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 990.

²⁹³ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 990.

²⁹⁴ See United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17par 30, 31, 34 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

²⁹⁵ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 991.

property treaties. He mentions the most obvious example, namely the reproduction rights clause and moral rights clause respectively in the Berne Convention. This may be an indication that states are allowed to partly fulfil the obligations imposed by article 15(1) (c) of the ICESCR²⁹⁶ by ratifying international intellectual property agreements and furthermore by enacting national intellectual property laws for the protection and enforcement of copyright, patents and other rights. However, Helfer²⁹⁷ cautions that many issues remain unresolved regarding the ‘core obligations’ approach followed by the CESCR, despite the commonalities between the human rights and intellectual property regimes. The approach leaves open the question about the meaning of ‘moral and material interests’ and also does not specify what the difference is between a human rights framework for creators’ rights and legal rules from intellectual property treaties and national legislation.

Helfer²⁹⁸ analyses the CESCR’s Comment²⁹⁹ regarding the difference between the moral and material interests of authors protected under article 15(1) (c) of the ICESCR³⁰⁰ and the provisions in international treaties and national legislation protecting intellectual property. The CESCR generally distinguished article 15(1) (c) of the ICESCR from intellectual property protection as follows:

‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons. This fact distinguishes article 15, paragraph 1(c), and other human rights from most legal entitlements recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination

²⁹⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

²⁹⁷ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 992.

²⁹⁸ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 993.

²⁹⁹ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17par 30, 31, 34 ([http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³⁰⁰ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.³⁰¹

From this comparison, it becomes apparent that the superficial similarities between the human rights protection of creators' rights and intellectual property protection are less important than the differences in scope.

The CESCR identified several other important features that distinguish the human rights protection of creators' rights from intellectual property rights.

'In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person.'³⁰²

The CESCR also distinguished the human rights protection of moral and material interests in intellectual creations from intellectual property protection on the grounds that the human rights protection 'safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage'³⁰³ and the basic material interest guaranteeing their adequate standard of living; whilst intellectual property generally protects the investments and interests of corporations and other juristic persons. The CESCR specifically cautioned against equating the human rights protection of article 15(1) (c) of the ECESCR³⁰⁴ with intellectual property protection.³⁰⁵

³⁰¹ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 1 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³⁰² United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 2 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³⁰³ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 2 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³⁰⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

Helfer³⁰⁶ states that this approach differs greatly from Anglo American copyright laws, which have always made provision for juristic persons to be the holders of intellectual property rights.³⁰⁷ He also notes that the protection granted in terms of article 15(1) (c) has ‘a distinctive human rights flavor’.³⁰⁸ An example would be the ‘national treatment’ of foreign authors and owners of intellectual property rights, which is one of the most important principles in intellectual property treaties. Some unexpected consequences stem from these distinctive features associated with a human rights approach. Helfer³⁰⁹ argues that if these rights are accepted as fundamental rights, governments would only be allowed to regulate the moral and material rights of authors under very narrow circumstances. Such regulation would only be allowed to protect other human rights or to attain social objectives. Helfer states that the CESCR has in fact developed a stringent test to determine whether restrictions that a state imposes on social and economic rights are legally acceptable and that this standard is reaffirmed in the Comment.³¹⁰

The CESCR specifically stated that the right protecting the moral and material interests of an author ‘is subject to limitations and must be balanced with the other rights recognized in the Covenant’. However, such limitations must

³⁰⁵ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 3 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³⁰⁶ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 993.

³⁰⁷ In South Africa, the position in intellectual property law is similarly that juristic persons may hold intellectual property rights. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 41-45. Also see Chap 5 (Immaterial Property Interests in the Constitution) for further discussion. See Yu PK ‘Ten common questions about intellectual property and human rights’ (2007) 23 *Ga St ULR* 709-753 at 728-729, where he also notes that corporations and other legal persons would not be able to claim that their human rights were violated.

³⁰⁸ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 993.

³⁰⁹ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 994.

³¹⁰ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 28 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)): ‘The obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author.’

‘be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society ... Limitations must therefore be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed. Limitations must be compatible with the very nature of the rights protected in article 15, paragraph 1(c)’.³¹¹

Under certain circumstances, compensatory measures may also be required for the imposition of limitations, for example ‘adequate compensation for the use of scientific, literary or artistic productions in the public interest’.³¹² In South African law, expropriation and deprivation of property is also only allowed under strict requirements set out in the Constitution.³¹³ Therefore it seems that the protection of the moral and material interests in intellectual property could be facilitated by the South African constitutional property clause in line with the guiding principles from international human rights law.

Helfer³¹⁴ states that this multipart test proposed by the CESCR would be seen as ideal by an intellectual property owner, since it constrains states more than the test for assessing whether states’ limitations on intellectual property is compatible with treaties. However, he cautions that governments would find it extremely difficult to balance authors’ rights and the public’s interest in access to knowledge if limitations imposed on authors’ rights were scrutinised too strictly and upheld only rarely. It is necessary to understand the purpose of a human rights framework for authors’ rights. The CESCR suggests a twofold purpose, comprising of the function to protect the ‘personal link between authors and their creations’ and to protect ‘basic material interests which are necessary to enable authors to enjoy an adequate standard of living.’³¹⁵ This approach indicates that there are certain ‘irreducible core rights – a zone of

³¹¹ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 22-23 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³¹² United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 24 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³¹³ See Chap 5 (Immaterial Property Interests in the Constitution) sec 5.2.5 for a discussion of the requirements.

³¹⁴ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 994-995.

³¹⁵ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and*

personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent, intellectual lives, all of which are essential prerequisites for any free society'.³¹⁶ Any protection above the protection of these core rights as envisioned by article 15(1) (c) of the ICESCR³¹⁷ would not be subject to the stringent test devised by the CESCR. It is evident that this particular approach is very close to the principle that the German Federal Court applies in balancing property rights with conflicting rights and the public interest, namely by asking whether an individual's particular right may 'serve the fundamental constitutional purpose of securing a sphere of personal liberty for the individual to take responsibility for her own affairs in the patrimonial field' and protecting or limiting the right accordingly.³¹⁸

Helfer³¹⁹ states that this approach entails that a country is obligated to guarantee the two core rights of authors and creators. Any protection above and beyond these core rights would have to be balanced with other rights and the public interest in access to knowledge in authors' work would have to be taken into consideration.³²⁰ These additional rights may be shaped by member states to fit in with a country's particular economic, social and cultural conditions. As Helfer³²¹ observes, a human rights framework for intellectual property at the same time grants more protection as well as less protection than intellectual property rights law. More stringent protection is granted to the core rights than intellectual property law would provide, but other rights which do not fall within these core rights receive less protection under human rights law than under the intellectual property regime, since party states are not obligated to recognise and protect any rights outside of the core rights. If a party state does decide to protect such other rights, these rights would be subject to other economic, social and cultural

material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant) (Jan 12, 2006) UN Doc E/C12/GC/17 par 2 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³¹⁶ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 996.

³¹⁷ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

³¹⁸ Van der Walt AJ *Constitutional Property Clauses* (1999) 151.

³¹⁹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 996.

³²⁰ The core rights will also have to be balanced with other fundamental rights, but it would be harder to justify a limitation of these rights.

³²¹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 997.

rights as well as the interest of the public in access to knowledge.³²² The German Federal Constitutional Court would also afford such rights less protection in terms of the scaling approach by reason that these additional protections would most likely pertain to commercial interests which is viewed as being further removed from the core principle of human flourishing in terms of which Article 14 determines whether constitutional protection is suitable given the nature of a particular property interest.

The comment of the CESCR does not give details about how states should proceed to create an intellectual property protection system that would also comply with the human rights framework. The comment does, however, provide three specific recommendations as well as an interpretive principle.³²³ In this paragraph, it is stated unequivocally that the right to the protection of moral and material rights of authors should be read together with other rights protected in the ICESCR.³²⁴ State parties should find a balance between authors' rights protected under article 15(1) (c) and the other rights from the Covenant in order to promote and protect all the various rights. Undue consideration should not be given to private interests of the author, in doing so neglecting the public interest in access to information. Helfer³²⁵ states that the interpretive principle that states have to consider all rights in the Convention serves as a reminder that states should reconcile all commitments stemming from treaties, although it also has the function of instructing states on how to reconcile intellectual property with human rights.

Helfer³²⁶ draws two conclusions from the CESCR's reference to 'core obligations'. The first is that such a reference indirectly recognises that states may find it difficult to resolve intellectual property rights protected under the Convention and responsibilities that do not fall within these core obligations. States are allowed some freedom to decide how to resolve

³²² See Chap 4 (The Value of Immaterial Property), particularly the section discussing the public domain or intellectual property commons (sec 4.8).

³²³ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 35 ([http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³²⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

³²⁵ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 997.

³²⁶ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 997-998.

human rights, intellectual property rights and other policy objectives. The second conclusion that may be drawn from the CESCR's reference to 'core obligations' is that the Committee has appropriated the power to determine which rights would be considered 'core', since the concept of 'core obligations' does not originate with the ECESCR,³²⁷ but is a creation of the Committee.

The CESCR³²⁸ specifies that states should ensure that the protection given to intellectual property does not impede the 'ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant'.³²⁹ States should ensure that the protection afforded to intellectual property does not result in unfairly high prices for essential medicines; plant seeds; or educational materials, since this would undermine the rights to health; food; and education, which are also fundamental rights. States should protect the respective rights to life, health, privacy and other rights relating to dignity from abuses related to scientific and technical progress. This could be done by refusing to grant a patent on an invention if its commercialisation would violate any of these rights. A particular issue for consideration is the patenting of the human body and its parts;³³⁰ and whether the granting of such patents would render a state non-compliant with the Covenant. The CESCR also suggests that states should do a human rights impact assessment before adopting legislation protecting the moral and material interests of authors and also after such legislation has been in force for some time.

³²⁷ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

³²⁸ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 35 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³²⁹ United Nations Committee on Economic, Social, and Cultural Rights *Comment on Economic, Social & Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c) of the Covenant)* (Jan 12, 2006) UN Doc E/C12/GC/17 par 35 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

³³⁰ See Chap 3 (Unconventional Immaterial Property Interests) sec 3.6, which discusses this aspect in more detail.

Helfer considers the aforementioned three aspects of the Comment to be important ‘specific prescriptions for member states’.³³¹ In sum, these recommendations to states are to prevent unreasonably high prices for access to essential intellectual property products; to prevent intellectual property rights that violate other essential rights; and to do a human rights impact assessment before and after implementing intellectual property legislation. In the opinion of Helfer,³³² it is still unsure what implications these recommendations would have for member states, since the comments of the CESCR are only advisory and could possibly be seen as nothing more than goals to aspire towards. Regardless, these recommendations could still induce important political and legal changes, most likely over the course of years. When states report on their progress and difficulties with implementation, the CESCR is able to question officials about rules for patent eligibility and license fees. Helfer³³³ also submits that countries that wish to implement more human-rights- friendly national intellectual property legislation could use these recommendations as a template. The World Trade Organization (WTO) dispute settlement panels could also use these recommendations in order to interpret TRIPS³³⁴ in a manner that is compatible with human rights.

After the CESCR’s recommendation, new non-binding norms as well as international treaties were created in an attempt to expand the CESCR’s influence in the area of human rights and intellectual property law. For example, a new international agreement, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention)³³⁵ was adopted by United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2005. The Cultural Diversity Convention is built upon the Universal Declaration on Cultural Diversity³³⁶ and is a response

‘to the belief shared by many governments that the increasingly fluid movement of cultural goods and services across national borders is endangering cultural diversity and domestic

³³¹ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 997-998.

³³² Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 999.

³³³ Helfer LR ‘International rights approaches to intellectual property: Towards a human rights framework for intellectual property’ (2007) 40 *UC Davis LR* 971-1020 at 1000.

³³⁴ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³³⁵ United Nations Educational, Scientific and Cultural Organization *Convention on the Protection and Promotion of the Diversity of Cultural Expression* (Oct 20, 2005) (http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 23 November 2009)).

³³⁶ United Nations Educational, Scientific and Cultural Organization *Universal Declaration on Cultural Diversity* (2002) (<http://unesdoc.unesco.org/images/0012/001271/127161e.pdf> (accessed 2 December 2009)).

cultural industries. The Cultural Diversity Convention is seen as a way to fight the danger to cultural diversity and to preserve distinctive national cultures'.³³⁷

Helfer³³⁸ states that the development of a human rights framework for intellectual property is still in the early stages and he proposes three different hypothetical scenarios for such a human rights framework. The first uses human rights to expand intellectual property; the second uses human rights to impose external limits on intellectual property; and the third proposes that human rights ends be achieved through intellectual property means. The first scenario entails expanding intellectual property rights at the expense of other human rights and consumers. This possibility is the reason why some commentators are sceptical of or even against analysing intellectual property rights in terms of a human rights framework. In such a scenario, industries that rely on intellectual property rights for their economic survival would use the authors' rights³³⁹ and property rights protected in human rights treaties to argue for the expansion of intellectual property protection.³⁴⁰ Since the authors' rights clauses in the UDHR³⁴¹ and ICESCR³⁴² 'share a close affinity with the natural rights tradition of *droit d'auteur* prominent in civil law jurisdictions', this particular version of the human rights framework's future is already becoming visible in the opinion of Helfer.³⁴³

He views the trend of European Constitutional courts relying on fundamental rights guarantees to justify intellectual property protection as proof of this assessment. He argues that it would not take much for these courts to begin utilising international human rights law to expand intellectual property protection even further. However, if domestic courts keep in mind the core purpose of property protection while using some variation of the scaling approach to determine which particular rights in a specified category of intellectual property

³³⁷ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1001-1002.

³³⁸ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1014-1020.

³³⁹ Protected in terms of article 15(1) (c) of the United Nations International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

³⁴⁰ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1015. See Chon M 'Intellectual property and the development divide' (2006) 27 *Cardozo LR* 2821-2912 at 2853; Raustiala K 'Density and conflict in international intellectual property law' (2007) 40 *UC Davis LR* 1021-1038 at 1031-1032.

³⁴¹ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) article 27(2) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁴² United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) article 15(1) (c) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 16 September 2009)).

³⁴³ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1015.

deserves protection and which ones do not, this encroachment on the public domain may be prevented. Since South African courts already use a balancing approach in order to determine which constitutional rights should take precedence, the unfortunate outcome predicted by Helfer may be avoided in its entirety. Intellectual property rights may be protected by the South African constitutional property clause in some instances where it is found to be necessary; and trumped in other instances where another more pressing right takes precedence.

The second scenario created by Helfer³⁴⁴ pertains to the use of human rights law to impose limits on intellectual property. Intellectual property user groups would most likely draw on other human rights in order to bring counterarguments to intellectual property rights owners who use the authors' rights provisions to argue for further intellectual property rights protection. An example would be the limitation of intellectual property rights by protection of the freedom of expression. National courts in Europe particularly have limited copyright by means of freedom of expression, justifying a use that is not covered in the intellectual property laws.³⁴⁵ These kinds of cases reach beyond the exceptions and limitations of intellectual property, imposing external limits or maximum standards of protection upon holders of the rights. In *Laugh It Off v SAB International*,³⁴⁶ the South African Constitutional Court limited trademark rights in terms of the right to freedom of expression in a similar way, also justifying a use outside of those provided for in the Trade Marks Act 194 of 1993. The right to freedom of expression ultimately limited the right of a trademark owner after the two rights were weighed up.

Helfer³⁴⁷ proposes that intellectual property user groups might increase the chances that courts would follow this second approach by extending this approach to other international lawmaking venues. On the authority of this idea, judges would be more likely to impose external limits on intellectual property rights if there were more treaties that provided specific

³⁴⁴ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1017.

³⁴⁵ See Geiger C 'Fundamental rights, a safeguard for the coherence of intellectual property law?' (2004) 35 *IIC* 268-280 at 277.

³⁴⁶ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC). See Chap 2 (Traditional Immaterial Property Interests) and Chap 5 (Immaterial Property Interests in the Constitution) for a discussion of the case and trademarks in general.

³⁴⁷ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1017-1018.

instructions as to how these limits should be applied. However, Helfer cautions that such a strategy also has risks, since the international law system does not have the centralised enforcement mechanisms of national laws. If there were an excess of conflicting rules, the international law system's coherence would be diminished even further. As a result judges would be less likely to refer to international law, since there would be uncertainty about how to interpret national legislation in line with the rules from international law.

The third possible scenario for a human rights framework for intellectual property rights as formulated by Helfer³⁴⁸ would achieve human rights ends through intellectual property means. The first two scenarios both take the existing intellectual property system as is, merely adding human rights protection to the existing system. This third scenario differs from both of the previous ones. The minimum outcomes for health, education, poverty and other human rights that states are required to protect and promote are specified first and thereafter mechanisms are identified that could possibly assist in achieving the goals set. Intellectual property laws should be protected insofar as it helps to achieve these goals, but where it hinders the process, such rules should be modified or restricted. In this scenario, the importance of intellectual property is secondary and the focus falls on providing minimum levels of human well-being by using intellectual property laws or other mechanisms. Helfer³⁴⁹ claims that it is not possible yet to determine which of these three scenarios would emerge as dominant, but it is certain that the two fields of intellectual property law and human rights law are becoming more and more intertwined, since the rules of international human rights law are becoming increasingly relevant to intellectual property law.

6 4 4 TRIPS and a Human Rights Framework for Intellectual Property

Blakeney³⁵⁰ states that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³⁵¹ was created in response to growing concern about the counterfeiting of

³⁴⁸ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1018-1020.

³⁴⁹ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020 at 1020.

³⁵⁰ Blakeney M *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement* (1996) 1-9 discusses the history of the drafting of TRIPS.

³⁵¹ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

trademarked products. The TRIPS³⁵² agreement was an Annexe to the WTO agreement establishing the WTO. The preamble of TRIPS³⁵³ begins by stating the members' desire

'to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade'.³⁵⁴

Helfer³⁵⁵ states that TRIPS,³⁵⁶ unlike prior international intellectual property agreements under the World Intellectual Property Organization (WIPO), has teeth and may be enforced by mandatory adjudication backed up by the threat of retaliatory sanctions. Proponents of the TRIPS³⁵⁷ agreement argue that relatively high standards of protection for intellectual property rights serve as an incentive for the creation of future intellectual property works. Furthermore, they also argue that developing countries gain freer access by means of benefits and concessions received from WTO agreements.

Yu³⁵⁸ submits that since the establishment of the TRIPS³⁵⁹ agreement in 1994, many less developed countries have found the international intellectual property system unsatisfactory. The reason for this is the perception that the system does not consider local conditions, needs and interests of less developed countries; and also that the TRIPS³⁶⁰ agreement hampers access to information, knowledge and essential medicines. Helfer³⁶¹ similarly remarks that developing countries are questioning the claims of the proponents of TRIPS³⁶² and he

³⁵² World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁵³ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁵⁴ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁵⁵ Helfer LR 'Regime shifting: The TRIPS agreement and new dynamics of international intellectual property lawmaking' (2004) 29 *Yale J Int'l L* 1-83 at 2.

³⁵⁶ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁵⁷ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁵⁸ Yu PK 'Symposium: The first ten years of the TRIPS agreement: TRIPS and its discontents' (2006) 10 *Marq Intell Prop LR* 369-410 at 370.

³⁵⁹ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁶⁰ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁶¹ Helfer LR 'Regime shifting: The TRIPS agreement and new dynamics of international intellectual property lawmaking' (2004) 29 *Yale J Int'l L* 1-83 at 3.

³⁶² World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

specifically observes that this is taking place at the stage where phase-in rules of TRIPS³⁶³ have expired and developing countries are unable to comply with TRIPS.³⁶⁴ The focus has fallen on the provisions of TRIPS³⁶⁵ that affect public health, human rights, biodiversity and plant genetic resources.³⁶⁶ Therefore it becomes apparent that the TRIPS³⁶⁷ agreement is another area of international intellectual property law where human rights law and intellectual property law interface and conflict. In this area it is also necessary to use the human rights supremacy principle in order to balance the rights in question. Furthermore, the just remuneration approach, core minimum rights approach and the progressive realisation approach could be useful in resolving conflicting rights.

6 5 Conclusion

In the pre-constitutional dispensation, international law did not play such a pronounced role. However, the South African Constitution assigns a much more pronounced role to international law in the new constitutional dispensation. In terms of the Constitution, South African courts are compelled to take note of international law, especially in cases where the Bill of Rights is at issue. Therefore this chapter indicates the most important international law sources that may aid South African courts in deciding which immaterial property interests may be accepted as constitutional property. The position of property law as an international fundamental human right is of particular importance, since not all of the unconventional immaterial property interests may be described as intellectual property rights.

Although the right to property is entrenched in the UDHR,³⁶⁸ it was not made binding in any subsequent international law instruments. However, some guidance for the construction of the property concept may be found in the European Union law, where Protocol 1 of the

³⁶³ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁶⁴ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁶⁵ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁶⁶ Helfer LR 'Regime shifting: The TRIPS agreement and new dynamics of international intellectual property lawmaking' (2004) 29 *Yale J Int'l L* 1-83 at 4.

³⁶⁷ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

³⁶⁸ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

ECHR³⁶⁹ protects property. Contrary to the right to property, intellectual property which is also entrenched in the UDHR³⁷⁰ was converted into a binding right in the ICESCR.³⁷¹ This is viewed as an exception to the general exclusion of property as a constitutional right in binding international law instruments. The last sections note the interaction between intellectual property rights and the need to develop a human rights framework for intellectual property. This is necessary to ensure that intellectual property rights play a role in promoting human rights instead of restricting other fundamental human rights unduly.

The 1996 South African Constitution compels courts, tribunals and forums to take international law into consideration. Courts must also interpret legislation in line with international law where an alternative interpretation would be incompatible with international law norms. In terms of the Constitution, international law is meant to play a larger role, especially where the interpretation of the Bill of Rights is concerned. Courts are obligated to take international law into account when interpreting the Bill of Rights, even if South Africa is not a party to the particular international convention or treaty in question. Therefore South African courts have to consider the UDHR³⁷² and the ICESCR³⁷³ in interpreting the Bill of Rights, even though the ICESCR³⁷⁴ has been signed but not ratified. More specifically, courts have to consider article 27(2) of the UDHR³⁷⁵ and article 15(1) (c) of the ICESCR³⁷⁶ in considering whether a specific intellectual property right may be protected as a human right under the property clause and in finding the correct approach to balance conflicting rights.

Intellectual property and property are dealt with separately under international human rights law. Since there are immaterial property rights that do not fall under the category of intellectual property law, it has proven necessary to deal with both property rights and

³⁶⁹ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 Protocol 1 (signed Paris 20 March 1952) Article 1 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)).

³⁷⁰ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁷¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³⁷² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁷³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³⁷⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³⁷⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁷⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

intellectual property rights under international law. Property rights are protected under article 17 of the UDHR,³⁷⁷ but it protects the right to own property alone as well as in association with others instead of the right to private property. Neither the ICESCR³⁷⁸ nor the ICCPR³⁷⁹ mentions the right to property as a fundamental human right and these are the treaties that create binding obligations from the rights in the UDHR.³⁸⁰ However, the ECHR³⁸¹ does guarantee the right to property and the wide interpretation of the property concept allows for the inclusion of certain immaterial property interests as fundamental human rights. These interests include rights arising from shares, intellectual property such as patents, arbitration awards, established entitlements to pensions, entitlements to rent, and even rights arising from running of a business such as licenses.

The ECHR is part of regional international law and for this reason its status is similar to foreign law, in other words European Union cases serve merely as persuasive authority for the South African courts. South Africa is not a member of the European Union and is unable to accede to the ECHR. A wide property concept is utilised for Article 1 purposes and both material and immaterial property interests are accepted as constitutional property, including property interests that are not considered to be property at national law. Article 1 is often construed as a general protection for wealth. Movable and immovable property is recognised and protected by Article 1.³⁸²

The economic interests in a restaurant (including a liquor licence)³⁸³ as well as a final, binding arbitration award³⁸⁴ constitute property, which is in line with the general view that a

³⁷⁷ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁷⁸ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³⁷⁹ United Nations *International Covenant on Civil and Political Rights* (Dec 16, 1966) 999 UNTS 171 (1976), entered into force Mar 23, 1976 (<http://www2.ohchr.org/english/law/ccpr.htm> (accessed 17 September 2009)). This covenant has been signed and ratified by South Africa.

³⁸⁰ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁸¹ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 Protocol 1 (signed Paris 20 March 1952) Article 1 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)).

³⁸² See *Wiggins v The United Kingdom* [1978] 13 DR 40, where it was stated unequivocally that Article 1 protects both movable and immovable property. Also see Van der Walt AJ *Constitutional Property Law* (2005) 117.

³⁸³ See *Tre Traktörer AB v Sweden* [1989] ECHR Series A vol 159. See Allen T *Property and the Human Rights Act 1998* (2005) 75-78.

³⁸⁴ See *Stran Greek Refineries and Stratis Andreadis v Greece* [1995] ECHR Series A vol 31B at 86.

vested or accrued money debt is protected as property.³⁸⁵ A share in a company³⁸⁶ as well as a contractual right over property³⁸⁷ is accepted as a property for Article 1 purposes. Under certain circumstances, compulsory contributions to a state pension may establish a right to the payment of pension benefits and this is accepted as property for the purposes of Article 1. In order to determine if such a payment constitutes property, it has to be established ‘whether there is a direct relationship between the contributions and the expectation of receiving pension benefits’.³⁸⁸ In other words, the case law of the European Union may serve as persuasive authority to South African courts that some commercial property interests (shares; debts and claims; and certain state-granted licenses) may be recognised and protected as constitutional property. Furthermore, participatory claims may be recognised as constitutional property, but only if there was some form of own contribution, which is similar to the German approach in this regard.

Certain intellectual property attributes are protected as fundamental human rights under article 27(2) of the UDHR³⁸⁹ and article 15(1) (c) of the ICESCR.³⁹⁰ The ICESCR³⁹¹ creates binding obligations for state parties and therefore states have to afford a certain level of protection to specific intellectual property attributes. These are the moral and material interests in intellectual property creations. The drafting histories of the UDHR³⁹² and the ICESCR³⁹³ make it clear that the inclusion of intellectual property interests under a human rights instrument was always controversial and much deliberation went into the final decision to include such rights. It also becomes clear that states have a wide berth to provide protection for these rights since the international instruments do not prescribe or endorse any

³⁸⁵ Van der Walt AJ *Constitutional Property Law* (2005) 117. See Allen T *Property and the Human Rights Act 1998* (2005) 46-57 for a more detailed discussion of the reasons why a debt is protected as a ‘possession’ in terms of Article 1.

³⁸⁶ Allen T *Property and the Human Rights Act 1998* (2005) 46. See *Lithgow v The United Kingdom* Series A No 102 (1986) 8 EHRR 329.

³⁸⁷ Allen T *Property and the Human Rights Act 1998* (2005) 46. See *Gasus Dosier-Und Fördertechnik GmbH v The Netherlands* Series A No 306-B (1995) 20 EHRR [53] and *Wilson v Secretary of State for Trade and Industry* [2004] 1 AC 816.

³⁸⁸ Van der Walt AJ *Constitutional Property Law* (2005) 118. See *X v United Kingdom* [1970] YB 13 892 and *X v The Netherlands* [1971] YB 14 224. See Allen T *Property and the Human Rights Act 1998* (2005) 71-75.

³⁸⁹ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁹⁰ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³⁹¹ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³⁹² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁹³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

particular method. In the South African Bill of Rights there is no separate right protecting the human rights attributes of intellectual property. It is therefore submitted that it would be suitable to afford protection to these rights in terms of the property clause, since the international human rights instruments allow for the protection of intellectual property interests in terms of property rights, even though this approach is not specifically endorsed. During the drafting of the UDHR³⁹⁴ and the ICESCR,³⁹⁵ little attention was given to the balance between private and public interests in intellectual property rights and currently this is a very important issue.³⁹⁶

It is important to develop a human rights framework for intellectual property in international law as this area is still largely unexplored. Such a framework would also be useful in guiding South African courts in the balancing of intellectual property rights and other human rights where they come into conflict. Torremans,³⁹⁷ Helfer³⁹⁸ and Yu³⁹⁹ have developed strategies for such a framework in varying degrees of specificity. All three of these authors began to explore the interface between human rights and intellectual property by suggesting the use of the conflict approach and the coexistence approach in the creation of a human rights framework. In terms of the conflict approach, intellectual property undermines human rights; while the coexistence approach postulates that human rights and intellectual property rights are in essence compatible and it is merely necessary to find a balance between the public and private rights in intellectual property, in other words between access to information and an incentive for the creation of more intellectual works; and also between other human rights and intellectual property rights. South African courts appear to have adopted the coexistence approach in dealing with intellectual property rights and human rights.⁴⁰⁰ In building a human

³⁹⁴ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

³⁹⁵ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

³⁹⁶ The issue of the public domain is discussed in Chapter 4 (The Value of Immaterial Property).

³⁹⁷ Torremans PLC 'Symposium: The international intellectual property regime complex: Is copyright a human right?' (2007) 2007 *Mich St LR* 271-291 at 281-282.

³⁹⁸ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020.

³⁹⁹ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753; Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149.

⁴⁰⁰ See *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC), where the court balanced the rights of a trademark owner and the right to freedom of expression.

rights framework for intellectual property, Yu⁴⁰¹ found that it is more important to determine which intellectual property attributes have a human rights basis and which do not than to choose between the conflict and coexistence approaches.

After determining this, it would be possible to use the human rights supremacy principle to give protection to other human rights above the attributes of intellectual property rights that have no human rights basis. For the intellectual property rights attributes that do have a human rights basis, the human rights supremacy principle would not be useful, since both of the conflicting rights in question are human rights. In such a case, three other approaches may be used either separately or in conjunction with one another. These are the just remuneration approach, the core minimum rights approach and the progressive realisation approach. Not all intellectual property rights should be protected under human rights law. Corporate trademarks, trade secrets owned by corporations, works-made-for-hire, employee inventions, neighboring rights, database protection, data exclusivity protection and other rights that protect the economic investment of institutional authors and inventors should be excluded from human rights protection. Although these rights could still be protected in terms of constitutional law as economic rights, they would not be considered fundamental rights.

There are arguments that in international human rights law pertaining to intellectual property, juristic persons should not be allowed to claim that their human rights were violated. This possibly means that the property rights of juristic persons would not be protected as fundamental rights, but rather as economic rights in terms of constitutional law. However, in South African law, the Constitutional Court has explicitly stated that juristic persons may receive human rights protection for their rights as far as it is applicable.⁴⁰² German law and Irish law also agree that the rights of juristic persons may enjoy constitutional protection. The German scaling approach entails balancing property rights with conflicting rights and the public interest by asking whether an individual's particular right may 'serve the fundamental constitutional purpose of securing a sphere of personal liberty for the individual to take responsibility for her own affairs in the patrimonial field' and protecting or limiting the right

⁴⁰¹ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753; Yu PK 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149.

⁴⁰² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 41-45.

accordingly.⁴⁰³ In terms of this approach, some rights that are closer to the concept of human flourishing would be protected more stringently as human rights, while the right that are merely economic rights would be protected less stringently as constitutional rights. This is similar to the approach in terms of which some attributes of intellectual property rights may be protected as a human right, while others that have no human rights attributes would receive no human rights protection. The German scaling approach is actually more efficient, since it does not exclude some intellectual property rights from constitutional protection at the outset, but balances the conflicting rights to determine which one should be protected more strongly. This approach is also relevant to determine which rights may be regulated more easily by the state.

Article 15(1) (c) of the ICESCR⁴⁰⁴ protects the moral and material interests of an author. The moral interest protects the personal link between an author and the intellectual work and encompasses the right of attribution and the right of integrity. The material interest, on the other hand, protects the limited interests of authors to acquire just remuneration for their intellectual labour. Helfer⁴⁰⁵ created three possible routes that the creation of a human rights framework for intellectual property could possibly follow. The first uses human rights to expand intellectual property; the second uses human rights to impose external limits on intellectual property; and the third proposes that human rights ends be achieved through intellectual property means. South African courts may utilise the approach in terms of which human rights ends may be achieved through intellectual property means, since this appears to be the best solution. This coincides with the German approach, in terms of which property interests are only protected as constitutional property if they serve the fundamental purpose of Article 14, namely securing an area of personal liberty in the patrimonial sphere for the holder of the property interest. In other words, where a particular property interest serves to further other human rights, the German Federal Constitutional Court would be more likely to protect a particular property interests strongly.

All of the intellectual property rights (patents, copyright, designs and trademarks) serve to secure a sphere of personal liberty in the patrimonial area. However, it is submitted that

⁴⁰³ Van der Walt AJ *Constitutional Property Clauses* (1999) 151.

⁴⁰⁴ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

⁴⁰⁵ Helfer LR 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 971-1020.

copyright is closer to the human personality than trademarks and should consequently be protected more stringently. In South African law, these particular rights are unproblematic since they are protected as property in private law and once they have vested and been acquired in terms of the statutes that create them they may receive constitutional property protection. In essence, the international law instruments serve merely as a mechanism to determine whether member states are complying with the requirements for providing protection to particular fundamental rights. Since South African law does provide protection to intellectual property in terms of private law property rules and the constitutional property clause has the scope to recognise and protect intellectual property rights, South Africa complies with the duty to protect intellectual property rights. Trade secrets, digital copyright and biotechnological products may also be treated as part of intellectual property and therefore the same considerations may apply. Traditional knowledge is not currently protected in South African law, but there is a movement towards protecting these interests under the existing categories of intellectual property. Traditional knowledge is very closely connected to the human personality and may consequently receive more stringent constitutional protection.

Finally, it is important to note that the TRIPS⁴⁰⁶ agreement poses further situations where human rights and intellectual property rights conflict and that a method for balancing such conflicting rights is of vital importance.

International human rights law indicates that at least certain human rights aspects of intellectual property law must be protected under human rights law. However, it cannot be determined which kind of protection is necessary and whether the particular attribute of an intellectual property interests should be protected more or less stringently until a particular case comes before the courts. However, the just remuneration approach, the core minimum rights approach and the progressive realisation approach may be utilised by South African courts in determining how strongly a particular right should be protected on the facts of the case. South African courts may turn to these international conventions and declarations for

⁴⁰⁶ World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (April 15, 1994) (http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4064 (accessed 17 September 2009)).

guidance on the interpretation of the Bill of Rights, especially since the South African Bill of Rights was inspired by the UDHR.⁴⁰⁷

The Comments by the United Nations Committees are also useful in providing guidance on the interpretation of the conventions and provide useful approaches and guidelines. This analysis shows that there is no reason evident from international human rights law why intellectual property and other unconventional immaterial property interests could not be protected under the constitutional property clause. In fact, the property rights system is one of the acceptable methods for providing protection to the human rights attributes of intellectual property. It also provides guidance for when immaterial property interests would not receive constitutional protection, for example inventions based on body parts. Since the South African Constitution does not have a separate clause protecting intellectual property rights, both intellectual property rights and other immaterial property interests have to be protected under the property clause insofar as international norms dictate. The South African property clause has the scope to allow protection of strong human rights such as housing as well as weaker economic rights such as commercial property. The difference is that the state may more easily regulate weaker economic rights than strong human rights, in other words the human rights are protected more strongly.

⁴⁰⁷ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

Chapter 7 Conclusion

7 1 Introduction

The central question that this dissertation aims to answer is whether immaterial property interests may be recognised and protected under the South African constitutional property clause and if so, under which specific circumstances. In order to determine the circumstances, a discussion and an analysis of the traditional and unconventional immaterial property interests were undertaken. In the first instance it was necessary to determine the requirements that need to be met for each of the specific immaterial property interests to be protected in private law. It was found to be necessary to separate the interests into different categories according to the different kinds of protection that they receive. There are interests that are protected as property in private law; interests that are protected in private law, but under an area of law other than property; and interests that receive no protection in private law. However, most of these interests share certain characteristics that make them suitable for constitutional property protection. A number of these characteristics may be distilled from property theories; South African and foreign constitutional property law; and international law principles. In the case of most of these interests, there is also no constitutional clause other than the property clause that could possibly provide protection to these interests.

There are two reasons why it was necessary to undertake this study. The first relates to the fact that there is no separate constitutional clause that provides protection to immaterial property interests. The second pertains to the fact that the South African constitutional property clause, like most property clauses, does not provide a definition of the property concept; and South African courts have not yet given clarity as to which specific immaterial property interests may be recognised and protected under the constitutional property clause. For this reason it was necessary to do a comparative study with a focus on foreign constitutional jurisdictions where case law provides some clarity and general indications with regard to which immaterial property interests may be included under the property concept. Specific international law human rights instruments were also discussed with this purpose in mind.

In the *First Certification* case,¹ the Constitutional Court needed to ensure that the Constitution complied with the 34 Constitutional Principles contained in Schedule 4 of the interim Constitution of the Republic of South Africa 200 of 1993. One of the objections to the constitutional property clause was that no provision was made for intellectual property. The Court held that the constitutional property clause is wide enough to protect all property interests that require protection in compliance with universal human rights norms. Initially, there were arguments that the constitutional property clause does not provide adequate protection to intellectual property rights. These arguments may have been due to confusion between the purposes of private law and constitutional law protection of property. The constitution guarantees property insofar as it prohibits arbitrary interferences by the state and provides protection in cases where the interests come into conflict with other fundamental rights, but it cannot serve the purpose of providing intellectual property rights or any other property rights with additional private law property rule-type protection against interferences by third parties. It cannot strengthen the property rule-type protection granted to property, since these are functions of private law protection. The argument that intellectual property rights are not adequately protected by the constitutional property clause cannot be successful, since it is not possible to determine which kind of protection is required by a particular category of property until a specific case comes before the South African courts. It is also inaccurate to argue that a particular category of property is so unique merely because it is created in terms of legislation, as to render it in need of a different kind of protection than that which the property clause can provide.

Despite these arguments, it is now accepted that any kind of property that is not specifically excluded by the property clause may be recognised and protected and that it is unnecessary to include a separate clause for intellectual property in the Bill of Rights of the Constitution of South Africa 1996. Intellectual property rights (the traditional immaterial property interests) as well as other immaterial property interests may be recognised and protected under the constitutional property clause. Constitutional property clauses generally employ a wide property concept and although it is generally accepted that property interests protected as property in private law would also be recognised under the property clause, a wider range of property interests may be protected in constitutional property law than under the concept of

¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 75.

property in private law. A general rule, suggested by Van der Walt,² is that the questions whether the interest can exist independently and whether the rights have vested or been acquired by the claimant according to normal principles of law, could determine whether these immaterial property interests may be included under the constitutional property concept.

It is extremely important to recognise the differences between the kind of protection granted to property in private law and constitutional property protection. In private law, the purpose is providing strong property rule-type protection for private rights against competing private parties. In constitutional law, the purpose of recognition and protection is to acquire protection for private interests against the state and in instances where these interests come into conflict with other constitutional rights of other private parties. Constitutional property law cannot guarantee any kind of property absolutely, since the constitutional property clause explicitly provides specific requirements in terms of which the state is permitted to interfere with property, namely by way of expropriation and deprivation. Similar to other categories of property, intellectual property as well as the unconventional immaterial property interests will most likely mainly be affected by the deprivation provision and not the expropriation provision. This usually becomes relevant in instances where the state finds it necessary to regulate property. If the state does not comply with the requirements in terms of section 25 while regulating property, this would constitute an arbitrary deprivation against which the property owner would be constitutionally protected.

Other possibilities where the constitutional property clause may be relevant for intellectual property rights as well as unconventional immaterial property rights would be in instances where these property rights conflict with other fundamental rights. In such cases the two conflicting rights must be balanced, therefore the immaterial property right will not automatically enjoy a higher level of protection in terms of the property clause than the other fundamental rights. As was demonstrated in *Laugh It Off v SAB International*,³ the Constitutional Court is prepared to grant a higher level of protection to other fundamental rights that are viewed as being more important than the intellectual property rights (a trademark in this case) protected in terms of the property clause. Section 25 requires that a

² Van der Walt AJ *Constitutional Property Law* (2005) 87.

³ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

balance be struck between the protection of individual rights and the promotion of social responsibilities.

Immaterial property interests were broadly classified into two groups, namely traditional immaterial property interests and unconventional immaterial property interests. Traditional immaterial property interests were defined to include the traditional categories of intellectual property, namely patents, copyright, registered designs and trademarks. Unconventional immaterial property interests were defined to include commercial information, confidential information, trade secrets, digital copyright, biotechnological products, traditional knowledge, commercial property, the so-called 'new property' or participatory claim rights and non-proprietary rights. Apart from this broad classification into traditional and unconventional immaterial property interests, immaterial property interests may also be broadly classified into three groups according to their protection outside of constitutional law. The first group encompasses interests that are recognised and protected as property in private law. The second group consists of immaterial property interests that are protected in private law under an area of law other than property. The last group includes immaterial property interests that receive no protection in private law.

The first group consists of immaterial property interests in patents, copyright, designs and trademarks which are also generally classified as categories of intellectual property. These are all *sui generis* forms of property in private law since legislation affords property rule-type protection to these interests and private law honours this position. In constitutional property law generally, the point of departure in constructing the property concept is that all property interests that are accepted as property for private law purposes would also be included under the constitutional property concept, although it is not restricted to property in private law. In other words, intellectual property rights should be accepted as constitutional property, but this does not mean that the other interests would necessarily be excluded. The unconventional immaterial property interests in digital copyright and some biotechnological products may also be included under the first category. There are also convincing arguments that trade secrets should be viewed as a *sui generis* intellectual property right. Non-proprietary rights are protected as property in private law and the only aspect that causes these kinds of interests to be problematic is the fact that they are not rights of ownership.

The second category consists of immaterial property interests in commercial information which may be protected by the law of contract; confidential information protected under the law of obligations; trade secrets that are protected at least in common law; commercial property; and participatory claims. These interests share certain characteristics with property and intellectual property and for this reason it is desirable to protect them under the property clause. With the exception of participatory claims which are explicitly protected in the Constitution as socio-economic rights, there is no constitutional clause that could possibly provide protection to these interests. The third category encompasses interests that currently receive no protection in private law or any other area of the law, namely traditional knowledge. In addition to the question whether these interests could be protected as property in constitutional law, it must also be asked whether these interests require some form of property rule-type protection in private law or some other form of protection.

The most efficient way to demonstrate which of the interests should be included under the constitutional property clause and under which circumstances is to consider each interest separately, describing each interest and thereafter applying what could be discerned from property theories, South African and foreign constitutional property law and human rights norms in international law. South African courts and tribunals may have regard to foreign law, but are obliged to take notice of international law.⁴ Consequently the conclusions may provide some guidance to the courts in decisions pertaining to the constitutional property protection of immaterial property interests. After considering each interest separately, this chapter summarises general guidelines that could be distilled from property theories, foreign law and international law. The specific characteristics that the unconventional immaterial property interests share with property rights and intellectual property rights are also summarised. Finally, this chapter suggests some guidelines that South African courts and the legislature may consider in providing private law protection for confidential information and traditional knowledge in future.

7 2 Immaterial Property Interests Protected as Property in Private Law

7 2 1 Introduction

As mentioned, intellectual property rights are *sui generis* forms of property. They receive property rule-type protection in terms of legislation and private law honours this position.

⁴ Sec 39(b) and (c) of the South African Constitution 1996.

Therefore patents, copyright, designs and trademarks should also be accepted as property under the constitutional property concept according to the general constitutional property law principle that interests protected as property in private law may also be recognised and protected as property in constitutional law. However, a more detailed discussion of each category and the applicability of South African and foreign constitutional law as well as international law to each specific category is required in order to strengthen the argument that intellectual property rights should be recognised and protected under the constitutional property clause. Since there is not much by way of case law in South African law that gives clarity as to which intellectual property rights may be recognised and protected by the constitutional property clause, it is of particular importance to consider the decisions in foreign law and international law that give clarity on the subject.

The impact of each specific property theory considered also needs to be assessed in determining the reasons why each separate category of intellectual property requires protection. Each intellectual property category is created and regulated by way of legislation and the legislation sets certain requirements that need to be fulfilled before an intellectual creation may be protected by the property-type rules created in terms of the legislation. Once these requirements are met and the creation qualifies for private law property protection, the property rights should also be recognised as constitutional property and would be protected, at least in principle.

7 2 2 Patents

Patents constitute the first category of intellectual property that may gain constitutional protection in this way. The registration of patents in South Africa is governed by the Patents Act 57 of 1978, which stipulates the requirements that an invention needs to comply with in order to gain property rule-type protection in private law. A patent must be for a new invention involving an inventive step in order to be registrable. The invention must have the ability to be used or applied in trade, industry or agriculture. Once registered, a patent grants the exclusive right to make, use or import products embodying the invention, as well as other rights. The term of a patent is twenty years from the date of application. For this limited period, a patent granted in South Africa is valid throughout the whole of South Africa. The invention falls within the public domain or intellectual property commons once the term expires and then the public may utilise the invention without any restrictions. For example,

once the patent for a medicine expires, it would be permissible to sell a generic version of the medicine.

If the invention complies with the requirements set by the Patents Act 57 of 1978 and therefore gains property protection in private law, then it should be possible to recognise and protect the vested intellectual property rights pertaining to patents in constitutional law as well. This would give constitutional protection against state interferences and against the competing fundamental rights of third parties, at least in principle.⁵

Foreign law also indicates that patents should be protected under the constitutional property clause. German constitutional law explicitly accepted patents as constitutional property⁶ despite the fact that German private law restricts the property concept to tangible property. In American law, patents are not recognised and protected as property in Takings law. However, this is due to the fact that the so-called Intellectual Property Clause provides specific protection to patents and copyright in American constitutional law.⁷ Therefore it is an indication that patents should be constitutionally protected. In the South African Constitution there is no constitutional intellectual property clause, hence the constitutional property clause is the only possible clause that could provide protection for patents.

Australian law accepts that tangible and intangible property may enjoy constitutional protection, although in more recent decisions a cut-back in the protection of intellectual property rights becomes visible.⁸ In *Nintendo Co Ltd v Centronics Systems Pty Ltd*,⁹ it was argued that the Circuit Layouts Act 1989 (Cht) constituted an infringement of Nintendo's intellectual property rights and that this legislation's impact amounted to the 'acquisition of property' and that they were consequently entitled to 'just terms'. This was rejected by the court since the legislature received the power to make such legislation from section 51(xviii) of the Constitution, which confers on the legislature the power to make laws that create, confer and enforce intellectual property rights. Basically, the legitimate regulation of such

⁵ See Chap 2 (Traditional Immaterial Property) Sec 2.3.

⁶ See *BVerfGE* 36, 281 [1974] (patent rights). See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.2.

⁷ There are also arguments that patents were historically protected under the Takings Clause in American law and that these cases have subsequently been forgotten, leading to the incorrect current position that patents are not protected as constitutional property under the Takings Clause. See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.3.

⁸ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

⁹ (1994) 181 CLR 134.

intellectual property would not constitute an acquisition for section 51(xxxi) purposes. However, in instances where the regulation is no longer legitimate, section 51(xxxi) could still provide constitutional protection to intellectual property. Since section 51(xvii) pertains to copyright, patents of inventions, patents of designs and trademarks, this position would be the same for all of these categories of intellectual property. Consequently, intellectual property rights (including patents) are protected as constitutional property even though the legislature is permitted to regulate property under specific circumstances. In Irish constitutional law, patents are accepted as constitutional property. *Phonographic Performance (Ireland) Ltd v Cody*¹⁰ explicitly accepted copyright as constitutional property and this is viewed as authority that the other intellectual property rights, including patents, are also recognised and protected as constitutional property.¹¹

In international human rights law, intellectual property is protected under the Universal Declaration of Human Rights (UDHR).¹² The right to intellectual property was entrenched and made a binding right in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³ South African courts are obligated to consider international law (even non-binding instruments) in the interpretation of the Bill of Rights. These instruments indicate that courts should recognise and protect intellectual property as constitutional property and this would clearly include property rights in patents.¹⁴ Under European Union law, intellectual property rights are accepted as ‘possessions’ for purposes of Article 1. European Union law is regional international law and since South Africa cannot be a party to the conventions, the law may merely serve as persuasive authority and therefore its status is similar to that of foreign law.

The natural-law theory or labour theory is useful to justify the protection of most intellectual property rights, including patents. However, the labour theory derived from Locke’s writings states that one becomes the owner of a resource by mixing one’s labour with that resource, provided that enough and as good as is left for others. There are criticisms that patents do not conform to this proviso. Additionally, the labour theory is not justification for the proposition

¹⁰ [1998] 2 ILRM 241, [1994] 2 ILRM 241.

¹¹ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

¹² United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹³ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

¹⁴ See Chap 6 (Immaterial Property Interests in International Law) Sec 6.4.

that a labourer would be entitled to the market value of the product. It could merely entitle the labourer to personally use and possess a creation and not to sell copies of the work or prevent third parties from copying it. There are also arguments that the labour theory cannot justify strong intellectual property rights, since too many problems and uncertainties are created. Intellectual property interests, including patents, are physically non-excludable but legally excludable, since legislation creates property rule-type protection for these categories. Some interests are morally non-excludable and as such should stay in the commons. The Patents Act 57 of 1978 specifically provides that certain aspects of inventions are not patentable. However, despite the criticisms levelled against the labour theory in the context of intellectual property rights, it is still a strong justification for the proposition that intellectual property rights (including patents) should be protected, although it gives no indication as to which kind of protection would be suitable.¹⁵

The reward theory is a variation of the labour theory that focuses on the fact that the labourer is rewarded for the benefit that the creation confers on society at large. The theory is suitable to justify the protection of any categories of immaterial property where the dissemination of information benefits society and for that reason the creator of such information is rewarded with an intellectual property right. This particular theory is suitable to justify protection of the intellectual property categories of patents, copyright, designs and to a lesser extent trademarks.¹⁶

According to the incentive theory, intellectual works must be protected by law to encourage other persons to also create intellectual works that may benefit society. This is viewed as the strongest justification for intellectual property rights. The American Intellectual Property Clause¹⁷ specifically refers to the incentive theory as the reason why patents and copyright should be protected. However, intellectual property rights also restrict the public access to such works; therefore a balance needs to be found between the protection of individual property rights for incentive purposes and the public's interests in access to the intellectual works. Especially in the context of patents, the intellectual property right is increasingly being used as a tool for monopoly. One solution is that the incentive purpose could still be

¹⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

¹⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

¹⁷ See the Constitution of the United States of America 1787 Article I Sec 8 Clause 8.

served if the term of protection for a patent were to be shortened.¹⁸ Spiritual theories such as the personality theory do not really convince in the area of intellectual property, with the possible exception of copyright. These theories may perhaps be relevant insofar as intellectual property rights are used by the owner in order to secure his sphere of liberty in the patrimonial field.¹⁹

The economic theory is generally used for the justification of protection for all categories of intellectual property, including patents. Intellectual property is physically non-excludable and non-exclusive. Once the time and money has been spent to create a particular intellectual property work, it can be reproduced at very low cost. For this reason, the economic theory postulates that this market failure needs to be overcome by awarding property rights in the form of a limited monopoly to creators of intellectual property; otherwise there would be no incentive to create such works if it can simply be freely appropriated by third parties.²⁰ However, since the intellectual property right takes the form of a limited monopoly, the same criticisms may be levelled against intellectual property rights as against monopoly rights. For this reason, the theory of natural monopoly was developed as an alternative metaphor for intellectual property.²¹ Both natural monopoly and intellectual property rights may be justified in terms of the high initial costs of development and low distribution costs. When applied to intellectual property, the criticisms of natural monopoly have the effect that intellectual property law develops in favour of the public domain instead of strengthening private property rights, as is the case with natural monopoly.²²

The intangible property commons or public domain is of particular importance for all of the categories of intellectual property. Intellectual property rights are already protected as property in private law. The problem is rather that intellectual property rights could be expanded to encroach upon the public domain and this must be prohibited. The public domain consists of resources that may not be protected in terms of intellectual property rights because they are morally non-excludable; works of which the intellectual property protection has expired; and aspects of intellectual property works that are not covered by property rights. In the United States of America there are movements towards lengthening the terms of

¹⁸ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

¹⁹ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

²⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.6.

²¹ Ghosh S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 2008 *U Ill LR* 1125-1183 at 1128.

²² See Chap 4 (The Value of Immaterial Property) Sec 4.7.

intellectual property protection as well as granting protection to aspects of works that could not previously be covered by intellectual property rights.²³ In South African law this should be prevented and a balance must be found between the protection of private property rights and interests in the public domain.²⁴ The structure of the constitutional property clause encourages such a balance.

7 2 3 Copyright

Copyright is the exclusive right relating to works of intellectual content to do or to authorise others to do certain acts relating to that work. The right to control these different uses of a work is the essential right under the law of copyright. In South Africa, the law of copyright is governed by the Copyright Act 98 of 1978. This Act prescribes certain conditions that must be met before copyright protection will subsist in a work. There must be an eligible work, a qualified person, the work must be original and must exist in a material form. Furthermore, propriety of the work is required. Once these specified conditions are met, copyright comes into existence automatically. Registration is not required. No uniqueness or inventive step is required in terms of originality, but the work should be the product of the author's own work and accomplishments.

A work must exist in writing or some other material form. There may be no copyright in ideas, hence only the material form of the expressed idea may be the subject of copyright. Provided that these conditions are met, the work will be protected by copyright for the duration of the author's life plus 50 years over and above that. If the work was never published during the author's lifetime, then the work will be protected for 50 years from the first act of publishing. In addition to the economic rights conferred in terms of copyright, the author of a copyright protected work has certain moral rights consisting of the right of paternity and the right of integrity respectively. The owner of the copyright has certain exclusive rights pertaining to the work once the requirements of the Copyright Act are met and copyright subsists in the work. These rights are not absolute, since provision is made in the Copyright Act for exemptions such as the fair dealing exemption. The Copyright Act confers property rule-type protection on copyright works. As a result, copyright is accepted

²³ See Haggerty PH 'Comment: The constitutionality of the Sonny Bono Copyright Term Extension Act of 1998' (2002) 70 *U Cin LR* 651-692.

²⁴ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

as a *sui generis* form of property in private law and should hence be accepted under the wider scope of constitutional property as well, similar to the position of patents.²⁵

However, a discussion and analysis of the treatment of copyright in foreign law and international law may strengthen the argument that copyright should be protected under the constitutional property clause. In German constitutional law, there are a number of cases that confirm that copyright is protected as property under the German Basic law.²⁶ In American constitutional law, the position of copyright is similar to that of patents. Due to the Intellectual Property Clause, copyright does not receive constitutional property protection in terms of the Takings Clause.²⁷ However, copyright does still receive protection in terms of the Intellectual Property Clause. Australian constitutional law accepts that intangible property may also be protected as constitutional property, which would most likely include copyright.²⁸ In Irish constitutional law, the case of *Phonographic Performance (Ireland) Ltd v Cody*²⁹ explicitly recognised and protected copyright as constitutional property.³⁰ All the foreign constitutional jurisdictions discussed indicate that copyright should receive constitutional protection since the property concept is wide enough. Even American law, which protects patents under a separate clause, indicates that copyright should also be protected under the South African constitutional property clause, since there is no separate clause for intellectual property. This could guide South African courts in the interpretation of the constitutional property clause and the property concept. International law also indicates that copyright should enjoy constitutional recognition and protection.³¹

The natural rights or labour theory may be used to justify the protection of copyright, although it does not necessarily justify strong intellectual property rights. The labour theory also has a built-in proviso that there should be enough left in the commons and that the rights of other persons should be considered when granting intellectual property rights.³² The reward theory is particularly suitable to justify the protection of copyright. Although creative

²⁵ See Chap 2 (Traditional Immaterial Property) Sec 2.4.

²⁶ See *BVerfGE* 31, 229 (Urheberrecht case) [1971] (Schoolbook case), *BVerfGE* 31, 248 [1971] (Broadcasting Lending case), *BVerfGE* 31, 270 [1971] (School Broadcast case), *BVerfGE* 31, 255 [1971] (Tape Recording I case), *BVerfGE* 31, 275 [1971] (Phonograph Record case) and *BVerfGE* 49, 415 [1978] (Church Music case). See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.2.

²⁷ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.3.

²⁸ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

²⁹ [1998] 2 ILRM 241, [1994] 2 ILRM 241.

³⁰ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

³¹ See Chap 6 (Immaterial Property Interests in International Law) Sec 6.4.

³² See Chap 4 (The Value of Immaterial Property) Sec 4.2.

works may be created regardless of whether intellectual property rights are conferred, it is the act of making the works available that is encouraged by the reward theory. Creators may not make their works available to the public if there is no prospect of some potential reward.³³ The incentive theory is useful to justify protection of the intellectual property category of copyright, although this does not mean that the amount of incentive is directly proportional to the strength of the intellectual property rights. The interest in access to copyrighted works should also be considered since it is equally important.³⁴ The protection of copyright may be justified in terms of the personality theory, since the work may be viewed as being close to the author's personality.³⁵ The economic theory and theory of natural monopoly are applicable to the protection of copyright, since copyright is a category of intellectual property and the same considerations as discussed in the section on patents are relevant.³⁶ The intellectual property commons or public domain is of particular importance for copyright, since these works often draw on existing works in order to create a new work. Consequently it is crucial to have access to non-copyrightable aspects of existing works as well as works outside of the copyright regime.³⁷

7 2 4 Designs

The Designs Act 195 of 1993 provides for the registration of aesthetic and functional designs. These designs are required to be produced by way of an industrial process. An aesthetic design is applied to an article, among others, for its form, pattern or decoration and needs to be novel and innovative otherwise it will not be registrable. Directly before the application date for the design or the date on which the design was first released to the public, the design must not be part of the state of the art. A functional design, on the other hand, protects the features that are necessary according to the function that the designed article is required to perform. The requirement for a functional design is that it must be new and not commonplace. Once these requirements set by the Designs Act are met and a design is registered, an aesthetic design is protected for a term of 15 years and a functional design for a term of 10 years. Once a design is registered, the owner of the design acquires the right to prohibit third parties from manufacturing or importing an article making use of the design. Similar to the other categories of intellectual property, designs are also recognised and

³³ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

³⁴ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

³⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

³⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.6 and Sec 4.7.

³⁷ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

protected as property under private law albeit because the legislation confers property rule-type protection and private law honours this position. Consequently, designs should also be accepted as constitutional property since the constitutional property concept traditionally accepts at least interests that are protected as property in private law.³⁸

Since registered designs are a new form of intellectual property that was created in South Africa to fill a lacuna between patents and copyright, there is limited foreign constitutional law available that may enlighten South African courts as to whether designs may be protected as constitutional property. However, since designs constitute a category of intellectual property similar to the other categories of intellectual property, it should also be recognised and protected under the constitutional property clause.

Protection of designs may be justified by the labour theory since it is a form of intellectual property.³⁹ Protection of designs may be justified in terms of the reward theory⁴⁰ as well as the incentive theory.⁴¹ It is uncertain whether the spiritual theories would be applicable for the justification of designs except perhaps insofar as it serves to secure a sphere of personal liberty in the patrimonial field.⁴² Similar to other categories of intellectual property, the economic theory⁴³ and theory of natural monopoly⁴⁴ may be applied to justify and criticise the protection of registered designs. The concerns regarding the commons are similarly applicable to designs.⁴⁵

7 2 5 Trademarks

The registration of trademarks is governed by the Trade Marks Act 194 of 1993. A trademark may consist of a word, a logo or a shape and is required to be distinct prior to registration in order to qualify for such registration on the trademarks register. The essence of a mark is its ability to be represented graphically. A trademark is perpetual in principle and may be renewed every 10 years upon payment of a renewal fee for each term. If the trademark is not renewed, it may be scrapped from the register. The Registrar may refuse to register a

³⁸ See Chap 2 (Traditional Immaterial Property) Sec 2.5.

³⁹ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

⁴⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

⁴¹ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

⁴² See Chap 4 (The Value of Immaterial Property) Sec 4.5.

⁴³ See Chap 4 (The Value of Immaterial Property) Sec 4.6.

⁴⁴ See Chap 4 (The Value of Immaterial Property) Sec 4.7.

⁴⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

particular trademark on so-called ‘absolute grounds’. For example, section 10(2) (a) states that if a mark fails to distinguish, it may not be registered. A mark that is purely descriptive regarding quality, quantity, purpose, geographic origin and so forth⁴⁶ or purely generic⁴⁷ may not be registered. Once the trademark meets the requirements of the Trade Marks Act and is registered, the property owner acquires the right to prohibit other, unauthorised parties from using a mark that is confusingly similar in relation to the same or similar goods and certain other exclusive rights pertaining to the mark. Infringement occurs if other persons use the mark without authorisation of the owner. Infringement occurs where there was unauthorised use in the course of trade of an identical or similar mark in relation to identical goods or services, where confusion is likely to occur⁴⁸ or where a registered well-known mark may be diluted due to its unauthorised use in the course of business.⁴⁹ The trademark right does not confer an absolute right and there are many exemptions from infringement provided for in the Trade Marks Act. Additionally, freedom of speech or parody may sometimes be a reason for exemption from infringement.⁵⁰ It appears that trademark law already provides extensively for exceptions and aspects that may not be trademarked based on considerations of the public domain. Since the duration of a trademark is perpetual in principle, it is necessary to provide the built-in restrictions.

The area of trademarks is the only category of intellectual property that has enjoyed attention in South African constitutional law. In *Laugh It Off v SAB International*,⁵¹ the Constitutional Court balanced the right to freedom of expression and the right to property in a trademark. Therefore, the Court implicitly accepted trademarks under the constitutional property concept. Even though the trademark right was ultimately outweighed by the right to freedom of expression, the Court was willing to recognise and in principle protect the trademark as constitutional property, although no actual protection was eventually afforded. By analogy, other categories of intellectual property may also be recognised and protected as constitutional property. This would be similar to the way Irish constitutional law accepts that the explicit recognition of copyright as constitutional property means that other intellectual

⁴⁶ According to sec 10(2) (b) of the Trade Marks Act 194 of 1993.

⁴⁷ According to sec 10(2) (c) of the Trade Marks Act 194 of 1993.

⁴⁸ Sec 34(1) (a) of the Trade Marks Act 194 of 1993.

⁴⁹ Sec 34(1) (c) of the Trade Marks Act 194 of 1993.

⁵⁰ See Chap 2 (Traditional Immaterial Property) Sec 2.6.

⁵¹ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

property rights are also protected as constitutional property.⁵² Trademarks are protected in terms of the constitutional property clause, at least equal to the protection enjoyed by other forms of property. This is the case even though other more important constitutional rights may still enjoy a higher level of protection as fundamental human rights than trademarks which may be considered a mere economic right in instances where trademarks and other fundamental rights come into conflict, as demonstrated by the case of *Laugh It Off v SAB International*.⁵³

Cases from foreign constitutional jurisdictions essentially merely serve to confirm the position in South African law that trademarks may be recognised and protected under the constitutional property clause. In German constitutional law, trademarks are explicitly recognised as constitutional property.⁵⁴ It is uncertain whether trademarks would be protected as constitutional property in American law, since the Intellectual Property Clause only protects patents and copyright.⁵⁵ Trademarks are not protected by this clause and could possibly still be recognised as property for purposes of the Takings Clause, although there is no certainty on this subject. Australian law does not deal explicitly with trademarks, although intangible property rights are accepted as property for constitutional purposes and therefore trademarks should be included. Even though specific provision is made for the regulation of intellectual property in Australian law, constitutional property protection may still be afforded to intellectual property, including trademarks.⁵⁶ In Irish constitutional law, the case of *Phonographic Performance (Ireland) Ltd v Cody*⁵⁷ which accepts copyright as constitutional property, is also viewed as authority that other intellectual property rights are recognised and protected as constitutional property. Therefore trademarks would also be protected in Irish constitutional property law.⁵⁸ In summary, the foreign law considered indicates that trademarks should be recognised and protected as constitutional property, at least in principle. International law requires the constitutional and private law protection of intellectual property, including trademarks.⁵⁹

⁵² See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

⁵³ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

⁵⁴ *BVerfGE* 51, 193 [1979] (*Warenzeichen* case) (trademarks). See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.2.

⁵⁵ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.3.

⁵⁶ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

⁵⁷ [1998] 2 ILRM 241, [1994] 2 ILRM 241.

⁵⁸ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

⁵⁹ See Chap 6 (Immaterial Property Interests in International Law) Sec 4.6.

The protection of trademarks is justified by the labour theory, although it has to be noted that it does not justify strong intellectual property rights.⁶⁰ Trademark protection cannot really be justified by the reward theory, since no real benefit is conferred on society if the owner of a trademark makes it available to the public. It may be argued that there is the relatively minor benefit to the public of not confusing the trademarked product with other possibly inferior products, although this is not actually the type of benefit that the reward theory envisions.⁶¹ Similarly, regarding the incentive theory, it is uncertain whether the creation of trademarks should be incentivised since there is no visible value to society.⁶² Perhaps the spiritual theories could be useful for the justification of trademark protection in some instances, since it may pertain to the name of a particular business or person.⁶³ The economic theory and theory of natural monopoly also apply to the justification and criticism of the protection of the intellectual property category of trademarks.⁶⁴ As mentioned, the intellectual property commons or public domain is also important for trademarks and the law of trademarks makes provision for this important interest in the public domain.⁶⁵

7 3 Unconventional Immaterial Property Interests Protected under Other Areas of Private Law

7 3 1 Introduction

Apart from the intellectual property rights that are protected as property in private law, the constitutional property concept can also accommodate other immaterial property interests that are not protected as property in private law, but under other areas of private law. The reason why it is desirable to recognise and protect these interests under the constitutional property clause is because these interests share certain characteristics with property and intellectual property. Furthermore there is also no constitutional clause other than the property clause that could afford protection to these interests. In most constitutional jurisdictions it is accepted that the constitutional property concept includes property interests that are protected as property under private law. However, it is also generally accepted that the property concept is not restricted to these property rights but includes a wider range of property-like interests, both tangible and intangible. Since there are no South African court cases that give clarity as

⁶⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

⁶¹ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

⁶² See Chap 4 (The Value of Immaterial Property) Sec 4.4.

⁶³ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

⁶⁴ See Chap 4 (The Value of Immaterial Property) Sec 4.6 and Sec 4.7.

⁶⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

to which of the unconventional immaterial property interests may be included under the constitutional property concept, it has been of utmost importance to analyse and discuss foreign constitutional law cases that provide clarity on this topic. This could provide guidance to South African courts in future cases where these issues need to be decided. The property theories for the justification of the protection of these interests are not particularly useful for all of the unconventional immaterial property interests and there may be other more applicable theories for the justification of their protection, but these fall outside of the scope of the research question. For example, the protection of traditional knowledge may be better justified by theories of distributive justice.

7 3 2 Commercial Information

Commercial information refers to information such as the news gathered by the plaintiff in the case of *International News Service v Associated Press*.⁶⁶ The United States Supreme Court held that although the information was published and therefore common knowledge which may be used by the public, the information had to be regarded as *quasi*-property in instances where competitors sought to use the information for profit. The reason why the court was prepared to protect the information as *quasi*-property is most likely because it was valuable and the plaintiff had spent money and time to acquire the information. Protection would be provided in terms of the law of unfair competition. In the English case of *Sports & General Press v 'Our Dogs' Publishing Co*,⁶⁷ the court was not prepared to provide any property or property-like protection to the information on hand, namely photos of a dog show.

However, what distinguishes the two cases is that in *International News Service v Associated Press*⁶⁸ there was no mechanism available to the owner of the information to acquire protection for the property, while in this case, the plaintiff had the option to prevent others from using the information by utilising mechanisms in terms of the law of contract and this was not done by the plaintiff. In other words, the protection of the information hinges on excludability. Where there were mechanisms available to make the information excludable by means of for example contract law and this was not utilised, the court viewed the information as non-excludable. However, where no such mechanisms were available for the owner of the

⁶⁶ 248 US 215 (1918).

⁶⁷ [1916] 2 KB 880.

⁶⁸ 248 US 215 (1918).

information to make the resource excludable, the court was prepared to grant protection to the information because it is a property-like interest. The Australian case of *Victoria Park Racing v Taylor*⁶⁹ did not accept that unfair competition could provide protection to the commercial information in the case, since it was physically non-excludable.

What becomes apparent from all three cases is that excludability is the deciding factor as to whether commercial information may receive property rule-type protection or not.⁷⁰ Only the American court was prepared to grant protection in terms of the rules of unfair competition, whereas the English and Australian courts were not, at least not on the facts of the respective cases. In all of these cases, the commercial information could be termed a physically non-excludable resource. However, in some instances there were mechanisms available in terms of which the owners of the information could provide the information with legal excludability. Where these mechanisms were not utilised, the courts were unwilling to provide property rule-type protection to the information. Since intellectual property provides no mechanisms for the protection of commercial information, the only possibility is contract rule-type protection. Once these mechanisms have been implemented and the information has become legally excludable, South African courts may be willing to provide constitutional property protection to the informational property interests.⁷¹

The Australian case of *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health*⁷² explained the difference between confidential information which enjoys constitutional protection under section 51(xxxi) and mere knowledge which is not protected *per se*. The distinction also pertains to excludability, in other words where third persons may be excluded from using confidential information, the confidential information would enjoy constitutional protection, while mere knowledge is free for all to use and would subsequently not be protected in constitutional property law.⁷³

It is possible that protection of commercial information could be justified by the labour theory although the question whether the resource is excludable is often more important in deciding whether the immaterial property interests may be protected as property. If some

⁶⁹ (1937) 58 CLR 479.

⁷⁰ Gray K 'Property in thin air' (1991) 50 *Cambridge LJ* 252-307 at 266-268.

⁷¹ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.2.

⁷² (1990) 95 ALR 87 (FC).

⁷³ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

mechanism for legal excludability was available, but the holder of the resource did not utilise it, then no constitutional property remedy would be available.⁷⁴ The reward theory could possibly be useful to justify the protection of commercial information, since information is made public, even though members of the public still have to pay for the information and they would not otherwise have had access to the information.⁷⁵ The incentive theory may be applied in this case, since people would not be prepared to spend time and money on creating or collecting such commercial information if it can be freely appropriated by third parties.⁷⁶ The spiritual theories do not really justify protection of commercial information.⁷⁷ The economic theory could justify the protection of commercial information, since the resource is physically non-excludable and use is non-rivalrous, similar to the intellectual property categories.⁷⁸ The criticisms of natural monopolies are not as applicable to commercial information as to the categories of intellectual property, since non-commercial use of the information would not be protected as property. Therefore the public already has adequate access and the concerns about the public domain are already addressed.⁷⁹

7 3 3 Confidential Information

The question pertaining to confidential information has two sides, both relating to insider trading. The first important question is whether a person who trades on inside information is entitled to property protection for his gains. The answer to that question is decidedly negative, since legislation pertaining to insider trading explicitly prohibits this. This interest would not be protected in private law and also not in constitutional law, neither as property nor under any other area of law. The second question pertains to the holder of the confidential information's immaterial property interests and whether this should be protected in private law and constitutional law. In South Africa, the Securities Services Act 36 of 2004 regulates insider trading. The act does not currently provide any property remedy to the holder of the confidential information. Protection is afforded in terms of liability rules, although there are arguments that the protection is inadequate. In Australia, for example, the Corporation Act of 2001⁸⁰ provides a corporation that had been the victim of insider trading the remedy to recover the losses, calculated as the difference between the price for which the securities had

⁷⁴ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

⁷⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

⁷⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

⁷⁷ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

⁷⁸ See Chap 4 (The Value of Immaterial Property) Sec 4.6.

⁷⁹ See Chap 4 (The Value of Immaterial Property) Sec 4.7 and Sec 4.8.

⁸⁰ Sec 1043L(2), sec 1043L(5) and sec 1043L(6).

been sold and the price at which it could have been sold but for the insider trading. However, this falls beyond the research question of this dissertation. It is sufficient to note that confidential information does enjoy protection under liability law and the only remaining question is whether confidential information may be recognised and protected as constitutional property, since it involves a patrimonial interest.⁸¹

In Australian constitutional law, the case of *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health*⁸² explicitly stated that confidential information should enjoy constitutional protection under section 51(xxxi). Although it was noted that knowledge *per se* is not proprietary in character⁸³ and that the protection of information is not based on a proprietary right in Australian law, the court found that there was a proprietary right in the information in this case.⁸⁴

Property rule-based protection of confidential information may be justified by the labour theory.⁸⁵ However, the protection of confidential information may not be justified by the reward theory since no information is made available which could possibly benefit society at large.⁸⁶ The same concern is relevant to the incentive theory.⁸⁷ The spiritual theories are incapable of making a contribution towards determining whether confidential information may receive property protection.⁸⁸ The economic theory may justify the protection of confidential information, since this interest has economic value which requires protection since it is physically non-excludable. However, the use cannot really be described as non-rivalrous as is the case with intellectual property.⁸⁹ The theory of natural monopoly cannot be applied to confidential information for the same reason.⁹⁰ Confidential information does not traditionally form part of the commons, so property protection provided to the interest would not amount to an enclosure of the public domain. However, new legislation or amendments to the existing legislation should keep the public domain in mind.⁹¹

⁸¹ See Chap 3 (Unconventional Immaterial Property Interests) sec 3.3.

⁸² (1990) 95 ALR 87 (FC).

⁸³ *Smith-Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 (FC) at 135.

⁸⁴ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

⁸⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

⁸⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

⁸⁷ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

⁸⁸ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

⁸⁹ See Chap 4 (The Value of Immaterial Property) Sec 4.6.

⁹⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.7.

⁹¹ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

7 3 4 Trade Secrets

Trade secrets are a *species* of the *genus* confidential information, which represents a valuable economic interest that deserves legal protection. This is granted in terms of common law once certain requirements are met. The first requirement is that the information must be capable of application in trade or industry. The information also needs to be secret or confidential and the owner must have the will to keep it secret. Thirdly, the information must be of economic or business value to the owner of the information and this must be determined objectively. The trade secret must also be concrete or potentially concrete.

It may be argued that trade secrets may be the objects of subjective rights since they are of economic value and enjoy the quality of scarceness. Trade secrets also possess the qualities of independence, distinctness and definiteness to be capable of use, enjoyment and disposal. If subjective rights to trade secrets are recognised, these subjective rights may be classified as intellectual property. Trade secrets are treated as intellectual property in the United Kingdom and the United States of America.⁹² In *Harcris Heat Treatment (Pty) Ltd v Iscor*⁹³ the court stated that the confidential information at issue was the intellectual property that belonged to the plaintiff. Therefore trade secrets may be seen as a *sui generis* form of property that differs from the other forms of intellectual property only in that they are created and regulated in terms of common law and not legislation. This would mean that trade secrets are protected as property in private law and should consequently also be recognised and protected as constitutional property.⁹⁴ Most foreign constitutional jurisdictions treat trade secrets as a category of intellectual property that is protected by the constitutional property clause. This could provide guidelines for South African courts in determining whether trade secrets may be recognised and protected as property for constitutional purposes. Even if it is not accepted that trade secrets constitute a category of intellectual property, the interests may still be seen as having economic value and being vested in terms of the common law requirements. As such, trade secrets should be recognised and protected as constitutional property regardless.

The protection of trade secrets may be justified by the labour theory. This is the case since trade secrets involve own effort and may be excluded from third parties. They are also often

⁹² See Vandeveldt KJ 'The new property of the nineteenth century: The development of the modern concept of property' (1980) 29 *Buffalo LR* 325-367 at 348-354. Also see Bainbridge DI *Intellectual Property* (1992) and Cornish WR *Intellectual property: Patents, Copyright, Trademarks and Allied Rights* (4th ed 1999) in general.

⁹³ 1983 (1) SA 548 (T) 555.

⁹⁴ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.4.

viewed as a category of intellectual property.⁹⁵ The reward theory has no applicability to the justification of the protection of trade secrets since the information is not made known and as such can have no benefit to society.⁹⁶ Similarly, the incentive theory does not really convince, since there is no visible benefit if the information is not made public.⁹⁷ Spiritual theories such as the personality theory are not applicable to the justification of trade secret protection.⁹⁸ The economic theory may serve to justify the protection of trade secrets.⁹⁹ Since trade secrets are analogous to intellectual property, the theory of natural monopoly may also be used to criticise the current form of protection of trade secrets.¹⁰⁰ Considerations of the commons or public domain are also important where trade secrets are considered for the same reason.¹⁰¹

7 3 5 Digital Copyright

Digital copyright is partially protected as property in private law under the category of copyright. However, since it is becoming increasingly difficult to enforce copyright in the new age of digitisation and the internet; copyright owners are increasingly turning to the law of contract to provide additional measures to enforce property rights. The main challenge is that the law of copyright was designed to provide protection for works of copyright in tangible form and has not been updated to protect works in digital form. The method that owners of copyright are utilising to address the problem entails reverting to anti-copy devices in the form of licenses, which is also leading to an encroachment upon the public domain. Works that should rightly fall into the public domain after expiration of the copyright term may still be protected by these licenses. The World Intellectual Property Organisation (WIPO) Copyright Treaty¹⁰² provides for the protection of technological protection devices used on copyrighted works, but maintains the balance between protection of the copyrighted work and interests in the public domain. In South Africa, the Copyright Act 98 of 1978 has not yet been updated to implement this treaty. If interests in digital copyrighted works are recognised and protected as constitutional property, as they should be, it may be argued that

⁹⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

⁹⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

⁹⁷ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

⁹⁸ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

⁹⁹ See Chap 4 (The Value of Immaterial Property) Sec 4.6.

¹⁰⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.7.

¹⁰¹ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

¹⁰² World Intellectual Property Organisation *Copyright Treaty* (March 6, 2002) (http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (accessed 4 February 2010)).

the South African legislature is duty-bound to provide protection for copyrighted works in digital format.¹⁰³

Digital copyright is merely an aspect of copyright that does not always receive adequate protection in terms of the law of copyright. The foreign constitutional law as well as property theories are applicable to digital copyright in the same way that they are applicable to copyright in the context of tangible works. These copyrighted works have value and may be seen as vested in terms of the rules of copyright and the rules of contract and as such should enjoy constitutional property protection.

7 3 6 Biotechnological Products

Similar to the way that digital copyright poses challenges to the law of copyright, patents are challenged by biotechnological products. The most controversial aspects relate to products derived from body parts and biological products. The question is whether patents may be granted over life forms and other products derived from human cells. There are arguments to be made against the granting of property rights in biotechnological products based on body parts such as cells, since they may be viewed as morally non-excludable. In other words, it is so important for the information to stay in the public domain in order for further research to be done, that it would be *contra bonos mores* to grant a patent over such a product. Although it is true that informational property and other forms of intangible property are fast becoming more important forms of wealth than tangible property, there are also many other rights and interests such as the rights to bodily integrity and privacy that need to be considered in instances where the informational property pertains to the human body. The United States case of *Moore v The Regents of the University of California*¹⁰⁴ is a prime example of the conflict between the rights of the person whose body part or genetic material is used to derive a patent and the property interests in protecting such an invention under the law of patents.

Therapeutic embryonic stem cell research is an area that poses particular difficulties, since this form of research makes use of cloning. In South Africa, the National Health Act 61 of 2003 makes provision for certain narrow exceptions that allow cloning. There are questions as to the suitability of the human body to be the subject of property rights and there are also arguments that the human genome is the common heritage of mankind and is therefore

¹⁰³ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.5.

¹⁰⁴ 51 Cal 3d 12; 271 Cal Rptr 146; 793 P 2d 479 1991.

morally non-excludable. It is submitted that only the biotechnological products that would qualify for a patent would be protected in private law and subsequently also in constitutional law. Since the Patent Act specifically excludes any form of cloning from being the subject of a patent,¹⁰⁵ it is unlikely that interests in biotechnological products that are not protected under patents would enjoy constitutional protection under the property clause. It is not permitted to sell any products such as human tissue, gametes, blood or blood products;¹⁰⁶ therefore these products would not be protected as property in either private law or constitutional law. In future, the legislature could provide legislation that creates a new category of property specifically for biotechnological products or merely update existing patent law legislation. However, it appears that there are sound reasons for the exclusion of patents based on human cell lines and as such these interests should not be recognised and protected under the constitutional property clause.¹⁰⁷

It is possible to justify the protection of biotechnological products in terms of the labour theory, although the proviso that enough and as good as must be left in the commons is of particular relevance for this category of unconventional immaterial property interests.¹⁰⁸ For this reason only certain biotechnological products would be protected by patent law, although the specific interests that are protected are protected for the same reasons as other products protected by patents. The concept of moral non-excludability is of great importance in this context. Protection for the biotechnological products that are not viewed as being morally non-excludable may be justified in terms of the reward theory¹⁰⁹ as well as the incentive theory.¹¹⁰ Perhaps the spiritual theories such as the personality theory may be used to justify protection of a person's property in his own body parts, especially in cases where his cells were used to derive an intellectual property product such as a cell line. The spiritual theories do not really convince where the property at issue is the intellectual property derived from such tissue by an inventor.¹¹¹ The economic theory¹¹² and the theory of natural monopoly¹¹³ apply to the justification and criticism of the protection of biotechnological products in the

¹⁰⁵ Patents Act 57 of 1978 sec 25(4) (b). See Chap 2 (Traditional Immaterial Property Interests) for a more detailed discussion of the requirements for a patent and exclusions from patentability.

¹⁰⁶ Sec 60 of the National Health Act 61 of 2003.

¹⁰⁷ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.6.

¹⁰⁸ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

¹⁰⁹ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

¹¹⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

¹¹¹ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

¹¹² See Chap 4 (The Value of Immaterial Property) Sec 4.6.

¹¹³ See Chap 4 (The Value of Immaterial Property) Sec 4.7.

same way that they apply to other patents. The commons or public domain is of particular importance in the area of biotechnological products. Information in products such as gene-sequences is seen as morally non-excludable resources in view of the fact that it is so important for this kind of information to stay in the commons in order for future researchers to have access to the information.¹¹⁴

7 3 7 Commercial Property

Intellectual property may be viewed as a form of commercial property, but since the interests in intellectual property have been addressed at length, it is the more controversial forms of commercial property that are of interest here. These are debts and claims; shares; goodwill; and state-granted licenses, permits and quotas. Since there is no case law in South Africa that clarifies whether these immaterial property interests may be recognised and protected as constitutional property, it is of particular importance to South African courts to turn to foreign and international law for some guidance. Although all of these interests fall under the broad category of commercial property, they are treated differently for purposes of constitutional property law. Debts and claims, both against private parties and against the state, are generally recognised as constitutional property in most constitutional jurisdictions. In German law, contractual debts and claims are protected in private law, but not as property. However, they may be recognised and protected as constitutional property since they serve the same purpose as property rights protected in private law, namely that they secure a sphere of personal liberty for the individual to achieve independence in the patrimonial field.¹¹⁵

Under Australian constitutional law, the cancellation of a debt amounts to a compulsory taking not only where the state acquires property, but where the state derives any kind of benefit by being released from a claim for damages. Debts and claims are recognised as choses in action and therefore as constitutional property, at least in principle. However, not every acquisition by the state falls within the scope of section 51(xxxi), since the state must still be able to regulate property interests legitimately. In *Mutual Pools & Staff Pty Ltd v Commonwealth*,¹¹⁶ the extinguishment of a contractual claim for a tax refund through legislation was held not to be an infringement of section 51(xxxi). In the case of *Health*

¹¹⁴ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

¹¹⁵ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.8. Also see Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.2.

¹¹⁶ (1994) 179 CLR 155.

Insurance Commission v Peverill,¹¹⁷ a claim for medical care benefits was deemed not to be an acquisition of property for section 51(xxxi) purposes. However, the case of *Georgiadis v Australian and Overseas Telecommunications Corporation*¹¹⁸ dealt with a common-law claim for damages relating to back injuries that had been extinguished by legislation and this was found to be invalid insofar as the legislation did not provide for just terms. Therefore, a debt or claim may be protected as constitutional property, but only if it is vested.¹¹⁹ For purposes of the wider property concept under Article 1 in European Union law, a final, binding arbitration award¹²⁰ constitutes property, which is in line with the general view that a vested or accrued money debt is protected as property. European Union law is regional international law that is not binding on South Africa and has the same status as foreign law.¹²¹

In most constitutional jurisdictions, shares are accepted as constitutional property even if it is not accepted as property in private law. In South Africa, shares have been accepted as incorporeal moveable property in *Cooper v Boyes NO and Another*,¹²² which makes the recognition and protection of shares as constitutional property somewhat more straightforward, since the point of departure is that interests protected as property in private law would also be protected as property in constitutional law. German constitutional law recognises and protects shares as constitutional property even though they are not protected as property in private law. Shares also serve to secure a sphere of personal liberty for the individual to achieve independence in the patrimonial field, which is the same function that property rights serve in private law and as such it is suitable to include shares under the constitutional property concept.¹²³ In Australian law, shares were specifically included under the constitutional property concept in the case of *Bank of New South Wales v The Commonwealth*.¹²⁴ The Irish case of *Kerry Co-Operative Creameries Ltd v An Bord Bainne*¹²⁵ accepts that the participation rights of a shareholder are protected as constitutional property, but that no constitutional protection is afforded where the value of a shareholding was reduced. However, earlier cases did grant constitutional protection to property rights of

¹¹⁷ (1994) 179 CLR 226.

¹¹⁸ (1994) 179 CLR 297.

¹¹⁹ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

¹²⁰ See *Stran Greek Refineries and Stratis Andreadis v Greece* [1995] ECHR Series A vol 31B at 86.

¹²¹ See Chap 6 (Immaterial Property Interests in International Law) Sec 6.3.

¹²² 1994 (4) SA 521 (C).

¹²³ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.2.

¹²⁴ (1948) 76 CLR 1. See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

¹²⁵ [1990] ILRM 664.

shareholders.¹²⁶ Under European Union law which is part of regional international law and has the same status as foreign law in South African law, a share in a company is also accepted as a 'possession' for Article 1 purposes.¹²⁷ Business goodwill may also be recognised as constitutional property, although it has not been accepted in all jurisdictions.

Licenses, permits and quotas have received limited property protection in foreign constitutional law, although there is resistance against protecting these interests as property since they originate in administrative awards. Protection may be granted if the rights are vested and acquired in terms of the relevant statute or regulation and have acquired commercial value. However, even if such protection is granted, these interests are still subject to administrative regulation.¹²⁸ The Irish case of *State (Pheasantry Ltd) v Donnelly*¹²⁹ dealt with the forfeiture of a liquor licence and the court held that the license was a privilege granted by statute and as such subject to change by statute. Consequently, the court was not prepared to grant constitutional property protection to the rights. Only once own effort and investment becomes apparent can there be the possibility of constitutional protection. This is similar to the approach of the German Federal Constitutional Court. No protection is provided to interests that are granted by the state and that can be amended or terminated unilaterally by administrative action. In *Maher v Minister for Agriculture, Food and Rural Development*,¹³⁰ the Irish court decided that quotas for the production of goods granted in terms of a statute are not property for constitutional purposes.¹³¹ Under European Union law, for purposes of the wider property concept under Article 1, the economic interest in a restaurant (including a liquor licence)¹³² is accepted as property.¹³³ The principle appears to be that if a particular interest is awarded in terms of an administrative grant and the interest may be amended or cancelled in terms of an administrative action, the particular interest is not protected in terms of the property clause, but only by administrative justice. However, once such an administrative award has vested in a holder and acquired value for the holder, the interest may be protected as a constitutional property right although it would not be

¹²⁶ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

¹²⁷ See *Lithgow v The United Kingdom* Series A No 102 (1986) 8 EHRR 329. See Chap 6 (Immaterial Property Interests in International Law) Sec 6.3.

¹²⁸ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.8.

¹²⁹ [1982] IRLM 512. Also see *Hempenstall v Minister for the Environment* [1994] 2 IR 20.

¹³⁰ [2001] 2 IR 139, [2001] 2 IRLM 481.

¹³¹ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

¹³² See *Tre Traktörer AB v Sweden* [1989] ECHR Series A vol 159.

¹³³ See Chap 6 (Immaterial Property Interests in International Law) Sec 6.3.

possible to query each and every administrative regulation, amendment or cancellation of the right.¹³⁴

With the exception of intellectual property and possible exception of shares, the labour theory does not really give any insights as to whether the broad category of commercial property should receive property protection.¹³⁵ The reward theory has no apparent applicability.¹³⁶ In fact, in all of the unconventional forms of commercial property, the interests already receive protection either in private law, albeit not under property law; or administrative law. As such, the property law theories are not particularly useful in determining the suitability of either private law or constitutional protection. The only issue is whether constitutional property protection is suitable and this may be determined by reference to the requirements that the interests must be of commercial value and must have been vested in terms of the normal rules of law.¹³⁷ The state-granted licenses, permits and quotas may still enjoy administrative justice protection under certain circumstances if they have not vested and acquired value and are consequently not protected as property.

7 3 8 Non-Proprietary Rights

In South African as well as German private law, ownership is closely linked to the property concept. In constitutional property law, the wider property concept is not restricted to notions of ownership. Rights other than ownership may enjoy constitutional property protection even against the owner. The requirements for the protection of such non-ownership property rights is that the right must exist separately or independently and must have vested in or been acquired by the property holder in terms of normal law.¹³⁸ In Australian law, the case of *Minister of the State for the Army v Dalziel*¹³⁹ established that the formal distinction between ownership and possession should not keep a court from granting constitutional protection, therefore at least certain non-proprietary rights should be included. The court accepted that real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action may be protected as constitutional property.¹⁴⁰ Under European Union law, regional international law which can

¹³⁴ See Van der Walt *Constitutional Property Law* (2005) 100-101.

¹³⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

¹³⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

¹³⁷ See Chap 4 (The Value of Immaterial Property).

¹³⁸ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.10.

¹³⁹ (1944) 68 CLR 261.

¹⁴⁰ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

serve only as persuasive authority for South African courts, a contractual right over property is also accepted as a 'possession' for Article 1 purposes.¹⁴¹

It is not useful to attempt the justification of non-proprietary rights by means of the property theories discussed, since these interests are already protected in private law. The only relevant question is whether these interests may be recognised and protected under the constitutional property clause. Foreign law and regional international law indicate that non-proprietary rights should be included under the constitutional property concept and South African courts may use this as a guideline when deciding whether constitutional protection should be awarded to a specific non-proprietary right.

7 4 Unconventional Immaterial Property Interests not Protected in Private Law

7 4 1 Introduction

This group of unconventional immaterial property interests may be distinguished from the other traditional and unconventional immaterial property interests in that they are not protected under private law; neither under the law of property nor under any other area of private law such as the law of contract. Therefore, in addition to determining whether these immaterial property interests may be protected as property under constitutional law, it was also necessary to determine whether these interests require property rule-type protection or some other form of protection in private law, at least for traditional knowledge. The problem is particularly not only interference from the state, but more distressingly the appropriation of the interests by third parties. This indicates a necessity for property rule-type protection. In considering arguments why it is necessary to grant constitutional property protection to the interests in traditional knowledge, it becomes apparent that the state may have a duty to create some form of protection for the holders of these interests. In this case, constitutional protection must necessarily be in terms of the property clause, since there is no other clause that could potentially provide protection. Participatory claims, on the other hand, would most likely not be protected in terms of the property clause, since there are specific clauses in the South African Constitution that recognise and protect socio-economic rights.

¹⁴¹ See *Gasaus Dossier-Und Fördertechnik GmbH v Netherlands* Series A No 306-B (1995) 20 EHRR [53] and *Wilson v Secretary of State for Trade and Industry* [2004] 1 AC 816.

7 4 2 Traditional Knowledge

For purposes of property protection in private law as well as constitutional law, products of traditional knowledge, such as traditional art, music and medicine that also have commercial value, are the most important immaterial property interests. Practically all categories of intellectual property as well as other immaterial property categories may be utilised either to protect or exploit traditional knowledge. For example patents, copyright, registered designs, trademarks and even confidential information may be used to protect or exploit traditional knowledge. The problem is that third parties appropriate the traditional knowledge and use it to derive patents, copyright works or even trademarks. Currently there is no protection against such appropriation save for limited protection in terms of patent law. The Patents Act 57 of 1978 has been amended to incorporate the requirements of the Biodiversity Act,¹⁴² which has the purpose of protecting natural resources. For any bioprospecting, a permit now has to be obtained which would only be granted once a benefit-sharing agreement has been reached between the persons wishing to do the bioprospecting and the holders of the traditional knowledge. It becomes apparent that there is a particular need for private law property rule-type protection for the holders of traditional knowledge.

It is important to note that there is currently a Traditional Knowledge Bill¹⁴³ in the process of becoming legislation that has the purpose of incorporating traditional knowledge under the existing categories of intellectual property in order to provide such property rule-type protection against third parties that attempt to appropriate the traditional knowledge. Therefore there is a movement towards protecting traditional knowledge as intellectual property, since property rule-type protection is the most efficient form of protection for traditional knowledge. However, the Bill has received sharp criticism since the categories of intellectual property are not designed to accommodate traditional knowledge, which is ancient established knowledge. Instead, there are proposals that traditional knowledge should be protected as a *sui generis* category of intellectual property, with legislation that provides specific remedies that are more appropriate to traditional knowledge. Either way, traditional knowledge would still receive property rule-type protection in private law, which would make its recognition and protection as property in constitutional law easier, similar to the way

¹⁴² South African National Environmental Management: Biodiversity Act 10 of 2004.

¹⁴³ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

other categories of intellectual property may be included under the constitutional property concept.¹⁴⁴

It is possible to interpret article 27 of the UDHR¹⁴⁵ and article 15(1) (c) of the ICESCR¹⁴⁶ broadly in order to include the rights of traditional communities and indigenous groups. This would strengthen the argument that provision must be made for some form of protection for property interests in traditional knowledge. The Draft Declaration on the Rights of Indigenous Peoples¹⁴⁷ and Principles and Guidelines for the Protection of the Heritage of Indigenous People¹⁴⁸ were drafted in order to close the loophole in intellectual property law in terms of which traditional knowledge is exploited. Intellectual property is identified as one of the challenges to traditional knowledge. However, the possibility that intellectual property could also be a part of the solution in protecting traditional knowledge is encouraged through utilising existing intellectual property protection mechanisms to include traditional knowledge. Intellectual property should be utilised in a way that benefits the holders of traditional knowledge. This is in line with South Africa's approach of eventually protecting traditional knowledge under the law of intellectual property.

The labour theory is not particularly useful in the context of traditional knowledge, since it is only the last person who laboured on a product who is rewarded in terms of the labour theory. This approach may even have the result that companies that use traditional knowledge without the consent of the holders would be justified in receiving intellectual property rights

¹⁴⁴ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.7.

¹⁴⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁴⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

¹⁴⁷ United Nations Economic and Social Council [ECOSOC] Sub-Commission on Prevention of Discrimination & Protection of Minorities *Draft Declaration on the Rights of Indigenous Peoples* (1994) UN Doc E/CN4/Sub2/1994/2/Add1.

¹⁴⁸ United Nations Economic and Social Council [ECOSOC] Sub-Commission on Prevention of Discrimination & Protection of Minorities *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Social Rapporteur* (June 21, 1994) UN Doc E/CN4/Sub2/1995/26, Annex 1 (initial text draft of Principles and Guidelines); United Nations Economic and Social Council [ESOSOC] Sub-Commission on Prevention of Discrimination & Protection of Minorities *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People* (2000) UN Doc E/CN4/Sub2/2000/26 (revised text of draft Principles and Guidelines). The Sub-Commission later adopted the Revised Draft Principles and Guidelines and transmitted them to the Commission for its approval. United Nations Economic and Social Council [ECOSOC] Sub-Commission on Promotion & Protection of Human Rights, Intellectual Property Rights and Human Rights *Resolution 2000/7* (Aug 17, 2000) UN Doc E/CN4/Sub2/RES/2000/7.

in the product they derived from the traditional knowledge.¹⁴⁹ Since traditional knowledge is usually already known, there is no point in providing an incentive to make the information known to the public as envisioned by the reward theory. Furthermore, it is not the holders of the traditional knowledge who receive a reward, but the company that derives an intellectual property work from the traditional knowledge.¹⁵⁰ The Traditional Knowledge Bill of 2008¹⁵¹ aims to change this position by allowing the holders of traditional knowledge a part of the reward. This Bill may in part be motivated by the labour and reward theories. No incentive was necessary for traditional peoples to create the traditional knowledge in the first place; therefore the incentive theory does not make any contribution towards justifying the protection of traditional knowledge.¹⁵² The spiritual theories are of particular importance in justifying the protection of traditional knowledge, since the knowledge is often so closely related to the holders' culture and religion.¹⁵³ Traditional knowledge has economic value and is a physically non-excludable resource. Its use is non-rivalrous, similar to categories of intellectual property. For these reasons, the economic theory may be used to justify the protection of traditional knowledge as property in private law.¹⁵⁴ At the moment, the theory of natural monopoly has no applicability to the protection of traditional knowledge, since the resource is already open for the public to use and does not currently receive any protection in private law. Perhaps once traditional knowledge is accepted as a form of intellectual property this theory would become applicable.¹⁵⁵ There are other theories that may be more applicable to justify the protection of traditional knowledge, such as distributive justice. However, they are not discussed here because they fall too far outside of the research question.

In the context of traditional knowledge, the intangible commons or public domain poses a different kind of challenge than for the other categories of immaterial property. Since traditional knowledge has always been viewed as part of the common heritage of mankind and consequently as part of the public domain and open for all to use, the problem is that more stringent protection is necessary for interests in traditional knowledge. Unlike intellectual property, where the dangers lie in the enclosure of the public domain, traditional

¹⁴⁹ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

¹⁵⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

¹⁵¹ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

¹⁵² See Chap 4 (The Value of Immaterial Property) Sec 4.4.

¹⁵³ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

¹⁵⁴ See Chap 4 (The Value of Immaterial Property) Sec 4.6.

¹⁵⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.7.

knowledge has never enjoyed property rule-type protection or any other form of protection in private law. However, the new legislation aimed at the property rule-type protection of traditional knowledge should be sensitive to the public domain.¹⁵⁶

Traditional knowledge currently receives no protection in private law, neither as property nor under any other area of private law. It became clear that traditional knowledge not only requires property protection in constitutional law, but also property rule-type protection in private law. South Africa is currently in the process of creating legislation that would protect traditional knowledge as intellectual property under the existing *sui generis* categories that are recognised as property in private law. However, due to the many problems with this Traditional Knowledge Bill¹⁵⁷ that cause the proposed protection to traditional knowledge to be inadequate, there have been proposal that traditional knowledge should rather be protected by separate legislation as a separate, *sui generis* category of intellectual property. Such a category of intellectual property should have the ability to provide protection to a kind of intellectual property that had already been created hundreds of years ago instead of focusing on works yet to be created. Such intellectual property rights must have the ability of being enforced worldwide, unlike other intellectual property rights that are territorial unless specific international agreements provide otherwise. Furthermore, this category of intellectual property would have to make provision for the reality that the owners of these rights are generally not the creators thereof, but rather descendants of such creators. According to Dean,¹⁵⁸ the essence of legislation affording *sui generis* protection to the intellectual property category of traditional knowledge should focus on preventing third parties from using the traditional knowledge without acknowledging the indigenous communities who hold the traditional knowledge and paying them royalties.

7 4 3 Participatory Claims

Participatory claims against state welfare and social benefits are sometimes protected as constitutional property in foreign constitutional law if the rights have vested and been acquired in terms of statutory or regulatory requirements and have acquired value.¹⁵⁹ In German law, these interests are protected as constitutional property provided that the public-

¹⁵⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

¹⁵⁷ Intellectual Property Laws Amendment Bill of 2007 published on 29 March 2010 GG 33055 and 5 May 2008 GG 31026 (South Africa).

¹⁵⁸ Dean OH 'Red card' (2009) Sep *Without Prejudice* 17-20 at 20.

¹⁵⁹ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.9.

law entitlement accrues to the beneficiary exclusively; the entitlement is based on the beneficiary's own or personal efforts; and the entitlement has the purpose to ensure the beneficiary's own survival. The right must be sufficiently separated from the control of the state and acquired by the person to the extent that the right may be regarded as belonging to the person in order for the right to be regarded as vested. It is also necessary that the person should have invested adequate own effort or expenditure to acquire the right. The reason why these interests are protected under the Article 14 of the German Basic Law is because there is no other constitutional provision that could provide protection for these interests.¹⁶⁰ In the Irish case of *Lovett v Minister for Education*,¹⁶¹ it was similarly held that the right to a statutory pension is constitutional property. This is also due to the fact that there is no other constitutional provision that could protect this right.¹⁶² In the United States, participatory claims are recognised as property for purposes of the Due Process Clause, but not the Takings Clause. Therefore it may be argued that participatory claims are not truly protected as constitutional property in American law, at least not to the same extent that German law affords protection.¹⁶³ In European Union law, compulsory contributions to a state pension may establish a right to the payment of pension benefits which is accepted as property for the purposes of Article 1 under certain circumstances. This regional international law is not binding on South Africa and may serve only as persuasive authority.¹⁶⁴ To determine whether a payment of welfare benefits constitutes property, it must be decided whether the contributions and the expectation of receiving pension benefits are directly related.¹⁶⁵

In South Africa it is unlikely that participatory claims will be protected in terms of the property clause since there are constitutional provisions that specifically protect socio-economic rights, which would include participatory claims. Therefore it is also unnecessary and unpractical to attempt a justification for the property protection of welfare participatory claims in terms of property theories, although Chapter 4 (The Value of Immaterial Property) does briefly mention the applicability of the theories. There are other theories for the justification of the protection of these interests that were not discussed here because they fall outside the scope of the research question. It suffices to state that these interests would most likely not be protected under the property clause. However, the insights from German law as

¹⁶⁰ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.2.

¹⁶¹ [1997] 1 ILRM 89.

¹⁶² See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

¹⁶³ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.3.

¹⁶⁴ See Chap 6 (Immaterial Property Interests in International Law) Sec 6.3.

¹⁶⁵ See *X v United Kingdom* [1970] YB 13 892 and *X v The Netherlands* [1971] YB 14 224.

to the circumstances under which an interest may be protected as constitutional property remain useful in the context of other immaterial property interests.

7 5 General Guidelines from Property Theories, Foreign Law and International Law

7 5 1 Property Theories

The natural-law theory justifies the protection of property on the basis that every person has a property in his own person, his own labour and works created with his labour. The basic idea is that by ‘mixing’ one’s labour with land or other tangible property, one acquires a ‘natural right’ to the property. This principle that a person should have property in that which he has created by his own intellectual effort and exertion played a large role in the recognition of intellectual property rights, but should not be the sole justification.¹⁶⁶

According to the reward theory, which is similar to the labour theory, an individual should be rewarded for his own labour and effort, but an individual should also be rewarded for his creative efforts that benefit the society. The current position is that the creative individual is awarded an exclusive intellectual property right for a limited period of time as a reward for his creative endeavours. In instances where intellectual property brings about the disclosure of works that would otherwise have remained secret, it enhances the free flow of information and does not restrict it. The just dessert theory is another variation of the reward theory, but similarly does not indicate what would be the appropriate reward for the creative individual and as such does not dictate that the reward has to be a property right. In essence, this theory holds that creative individuals should be rewarded for making their intellectual creations public since the creations benefit society at large.¹⁶⁷

The incentive theory postulates that if creative works are protected by law and creators may reap some form of benefit, then other creative individuals would also be motivated to create new intellectual works which may benefit society. This is still seen as the strongest justification for the protection of intellectual property rights and some unconventional immaterial property interests. However, a balance is required between providing an incentive to create new creations and keeping such works and inventions accessible to the public.¹⁶⁸

¹⁶⁶ See Chap 4 (The Value of Immaterial Property) Sec 4.2.

¹⁶⁷ See Chap 4 (The Value of Immaterial Property) Sec 4.3.

¹⁶⁸ See Chap 4 (The Value of Immaterial Property) Sec 4.4.

The spiritual theories state that an author's personality, spirit and will cannot be free unless the author is also the owner of the work created. Consequently, before creators can be fully in control of their spirit and personality, property rights in the creations must be granted. A person must have dominion over certain objects in order to achieve individual autonomy. However, in the context of intellectual property rights, a creator's right to use his invention must be distinguished from the right to prevent others from using the invention. Not having the right to exclude others from using the invention would not affect the creator's right to use it. This theory has been developed into the personality theory.¹⁶⁹ According to the personality theory, a person has to have control over certain resources in the external environment in order to be a person and such control needs to be fulfilled by property rights. In the context of intellectual property, the question whether an interest may be justified by the personality theory or not depends on how central an interest is to the fulfilment of one's personhood. The closer a specific property interest is related to the personality, the stronger such an interest would be protected.¹⁷⁰ This is similar to the German Federal Constitutional Court's scaling approach in terms of which a particular property interest would receive stronger protection the more closely it is connected to the purpose of Article 14, namely to secure a sphere of personal liberty in the patrimonial field.¹⁷¹

In the context of intellectual property, the economic theory states that market failure needs to be overcome by providing an economic incentive to create. Intellectual property is not inherently scarce like tangible property, but needs to be made scarce artificially through legislation. The market value of intellectual creations is based upon artificial scarcity imposed by property legislation as well as market demand. Due to these factors, the economic argument cannot be strictly applied to intellectual property. According to the economic argument, suppliers would refrain from producing and supplying to the market if there were no specific property protection, even with potentially high prices and profits. This argument is based on the principle of free riding, namely that opportunists should not be allowed to reap where they have not sown. Intellectual property goods are physically non-excludable and non-rivalrous. The products can be reproduced at very low cost and in order to provide adequate incentive for the production of such goods, it is necessary to grant a limited

¹⁶⁹ Radin MJ 'Property and personhood'(1982) 34 *Stan LR* 957-1015.

¹⁷⁰ See Chap 4 (The Value of Immaterial Property) Sec 4.5.

¹⁷¹ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.2.

monopoly in the form of an intellectual property right. However, these monopoly rights may also be seen as anti-competitive.¹⁷²

The theory of natural monopoly is considered as an alternative to the economic theory. Intellectual property theory often justifies the exclusive rights granted by reference to the high fixed costs of production and the small marginal distribution cost of the subject matter of patents, copyright and trademarks. However, this also justifies the protection of natural monopolies and their regulation and as such the theory of natural monopoly may also be used to explain the regulation of intellectual property. By understanding intellectual property as a system of regulation, the protection of intellectual property may be understood as an aspect of public law. This creates a system in terms of which the exclusivity of intellectual property rights may be altered to include other rights and interests such as the interests in the public domain or the right to freedom of expression.¹⁷³

The public domain or intellectual property commons consists of creative works that are not protected by intellectual property rights. Some of these interests are incapable of being owned by virtue of their legal nature and yet others are kept in the public domain as a matter of policy. Some may be described as morally non-excludable. There are also certain aspects of intellectual property protected works that fall in the public domain. These are provided for in the legislation governing each category of intellectual property. An example may be the fair use exception provided in the South African Copyright Act 98 of 1987. Two possible normative principles that could guide the process of creating a regulatory system are 'utilitarianism' and 'distributive justice'. This entails three distributional concerns, namely distribution among creators; distribution among creators and users; and intergenerational distribution.¹⁷⁴ The public domain entails free use, although this means unrestricted use rather than use without payment. In other words, everyone would have access upon the payment of some flat fee and the holder of an intellectual property right would not be able to exclude certain persons from the use of a work. The public domain consists of materials that are morally non-excludable or non-excludable for another reason and as such are not protected by intellectual property rights, but also aspects of intellectual property protected works that fall outside of the area of protection. The public domain is an important interest which should

¹⁷² See Chap 4 (The Value of Immaterial Property) Sec 4.6.

¹⁷³ See Chap 4 (The Value of Immaterial Property) Sec 4.7.

¹⁷⁴ Ghosh S 'The fable of the commons: Exclusivity and the construction of intellectual property markets' (2007) 40 *UC Davis LR* 855-890 at 866-870.

be developed as a right rather than a privilege, since it is of such great importance to ensure that raw creative materials remain outside the property regime so that future creative works may draw on these materials.¹⁷⁵

7 5 2 Foreign Law

In German law, the constitutional property concept is not restricted to property protected in private law although all private law property rights are included under the property concept. A wider property concept is used, including both tangible and intangible property. German courts use the purpose and context of the property clause as well as the values of the constitution to determine which property interests may be protected as constitutional property. The rights of natural persons as well as juristic persons may be protected by the property clause. The question whether or not a sphere of personal liberty may be secured for the individual to achieve independence in the patrimonial field, by affording protection to the specific interest through the property clause (Article 14) is decisive in determining whether a particular interest may be protected as property. Property also has a social obligation and therefore the state may regulate property in the public interest. However, the state may not ‘infringe the essence of ownership’¹⁷⁶ since the public interest would be subject to the property right if it is based in personhood.

In cases relating to intellectual property, the German courts treat the right to intellectual property in close proximity with the rights of personality and artistic freedom, but also focus on the social character of intellectual property. The duty of the state is to preserve the core of a right, even though interferences are permitted. The purpose of Article 14 is to guarantee the institution of property. Two requirements must be met by an immaterial property interest not protected as property in private law before it will be protected as constitutional property in German law: In the first instance, only concrete rights are protected and not merely the general patrimony, wealth or estate of a person. Secondly, only rights vested or acquired in terms of private law, including the applicable legislation, are protected and not mere expectations. In these instances where a particular interest displays these characteristics, it is suitable to protect the interest under the constitutional property clause if there is no other constitutional provision that could provide protection. The German Federal Constitutional Court’s scaling approach is particularly useful where conflicting constitutional rights must be

¹⁷⁵ See Chap 4 (The Value of Immaterial Property) Sec 4.8.

¹⁷⁶ Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 253.

balanced. In terms of this approach constitutional rights are protected stronger if they are more closely connected to the human individual, but weaker if the interest is purely economic. Hence, human or personal rights such as the rights to liberty and dignity would be protected more strongly than economic interests such as property rights.¹⁷⁷

The American constitutional property law concept is wide and even the private law property concept is wider than in most Roman-Germanic law systems. American takings law does not provide protection for patents and copyright in terms of the Takings Clause, although this is due to the existence of the Intellectual Property Clause,¹⁷⁸ which specifically provides for the promotion and protection of copyright and patents. Trade secrets are protected under the Takings Clause and other categories of intellectual property could still be protected by analogy.

Although the Australian Constitution does not contain a classic property clause, courts still treat section 51(xxxi) as a property guarantee and therefore the South African courts may learn valuable lessons from the Australian approach to immaterial property interests and their inclusion under the property concept. A wide property concept is applied in Australian constitutional property law. Both tangible and intangible property is included under the constitutional property concept; and under specific circumstances the taking by the state of one strand of the bundle of rights in property may constitute an acquisition. In order for a right or interest to be included under the constitutional property concept, it must be definable, identifiable by third parties, have some degree of permanence or stability and be capable in its nature of assumption by third parties.¹⁷⁹ The case of *The Commonwealth of Australia and Another v The State of Tasmania and Others*¹⁸⁰ stated that the acquisition of the right to exclude others from the property was sufficient to constitute property for constitutional purposes. This is similar to the position in American constitutional property law. In general, a vested cause of action under a general law constitutes a form of property for section 51(xxxi) purposes. Not every valuable interest is protected as constitutional property and a legitimate regulation of property would not constitute an acquisition in terms of section 51(xxxi).¹⁸¹

¹⁷⁷ See Chap 6 (Immaterial Property Interests in International Law) Sec 6.4.3.

¹⁷⁸ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.3.

¹⁷⁹ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

¹⁸⁰ (1983) 158 CLR 1.

¹⁸¹ See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.4.

In Irish constitutional law, the scope of the property concept is very wide since the Irish courts are not particularly concerned with the meaning of the property concept. Intangible rights that are created both in terms of legislation and contract are protected as constitutional property. Natural persons as well as corporate bodies are entitled to constitutional protection of their property rights. The general rule is that an interest that has vested and has acquired commercial value may be protected as constitutional property.¹⁸²

7 5 3 International Law

Although the right to property is protected under article 17 of the Universal Declaration of Human Rights (UDHR),¹⁸³ the right was not made binding in subsequent instruments. An exception was made for intellectual property. Only European Union law has produced some useful guidelines that may be utilised by South African courts in deciding which immaterial property interests (that are not also intellectual property) are recognised and protected by the constitutional property clause. However, this is regional international law that is not binding on South African courts; hence the cases have merely persuasive authority, similar to the status of foreign law. Article 1 of Protocol Number 1 to the European Convention on Human Rights (ECHR)¹⁸⁴ guarantees the right to property and interprets the concept of ‘possessions’ as used in the article broadly. However, only property that is already in existence (vested) may be protected, in other words if an applicant is able to prove a valid claim. This is similar to the position in most constitutional jurisdictions. Article 1 is also utilised as a general protection for wealth and its meaning is construed within the Convention and Protocols as a whole.

The Universal Declaration of Human Rights (UDHR)¹⁸⁵ of 1948 and International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸⁶ of 1996 accepts the right to intellectual property as a fundamental human right and requires all states to provide adequate protection to intellectual property rights. Article 27(2) of the UDHR entrenches intellectual property rights as follows: ‘Everyone has the right to the protection of the moral and material

¹⁸² See Chap 5 (Immaterial Property Interests in the Constitution) Sec 5.3.5.

¹⁸³ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁸⁴ Council of Europe *The European Convention on Human Rights* (Nov 4, 1950) 213 UNTS 221 (<http://www.hri.org/docs/ECHR50.html> (accessed 24 November 2009)).

¹⁸⁵ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁸⁶ United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (1976) (<http://www2.ohchr.org/english/law/cescr.htm> (accessed 24 November 2009)).

interests resulting from any scientific, literary or artistic production of which he [or she] is the author'.¹⁸⁷ It is necessary to develop a human rights framework for intellectual property and the implications of protecting certain intellectual property aspects under human rights law still need to be analysed thoroughly. It was possible to identify some preliminary guidelines from the international human rights instruments, comments and the opinions of international law scholars. This framework could provide South African courts with some guidance to determine which specific aspects of intellectual property as well as unconventional immaterial property interests may be protected as constitutional property and under which particular circumstances.¹⁸⁸

Two approaches may be identified to describe the interaction between human rights and intellectual property, namely the 'conflict approach' which holds that the two sets of rights are fundamentally in conflict; and the 'coexistence approach' in terms of which the two sets of rights are seen as in essence compatible.¹⁸⁹ In South Africa, it should be possible to apply the coexistence approach, since the courts make use of the balancing test in instances where two constitutional rights come into conflict. This was in fact done in the case of *Laugh It Off v SAB International*,¹⁹⁰ where the right to freedom of expression ultimately outweighed the right to property in the trademark and received more stringent constitutional protection. The purpose of the coexistence approach is to find a balance between private rights in property and the public right of access to creative works. The South African Constitutional Court correctly did not apply the conflict approach in terms of which the right to property would have undermined the right to freedom of expression, which would have caused South Africa to be in compliance with implementing other fundamental rights.

However, in adjudicating constitutional property cases relating to intellectual property, it is important for courts to distinguish the human rights attributes of intellectual property from the aspects of intellectual property protection that have no human rights attributes. Where the non-human rights attributes of intellectual property conflict with a fundamental right, it is

¹⁸⁷ United Nations *Universal Declaration of Human Rights* (1948) GA Res 217 A (III), UN Doc A/810 at 71 (1948) (<http://www.un.org/en/documents/udhr/> (accessed 24 November 2009)).

¹⁸⁸ See Chap 6 (Immaterial Property Rights in International Law) Sec 6.4.2.

¹⁸⁹ See Helfer LR 'Human rights and intellectual property: Conflict or coexistence?' (2003) 5 *Minn Intell Prop R* 47-61. Also see Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 709.

¹⁹⁰ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

effortless to decide that the fundamental right outweighs the intellectual property right in terms of the principle of human rights primacy. This may be referred to as an external conflict. However, in cases of internal conflicts, namely where the human rights attributes of intellectual property conflict with another fundamental right, a more nuanced balancing approach is necessary. For such cases, three approaches have been identified, namely the just remuneration approach; the core minimum approach; and the progressive realisation approach. These approaches may be used separately or in conjunction in order to resolve conflicts between other fundamental rights such as freedom of expression or the right to education; and human rights attributes of intellectual property which could be recognised and protected by the South African constitutional property clause.¹⁹¹

According to the just remuneration approach, authors and inventors hold a right to remuneration for the creative work rather than a right to exclusive control of the work. Individuals wishing to use the intellectual work would obtain a human rights-based compulsory license instead of a free license. In other words, everyone is allowed access, but upon payment of some flat fee. The core minimum approach refers to the minimum essential levels of protection that a state has to provide in order to comply with human rights obligations. This approach entails a balancing of the obligations of a state and the constraints imposed by a scarcity of economic and natural resources. This approach was specifically created for the ICESCR as a mechanism to determine whether a state has fulfilled its obligations relating to economic, social and cultural rights insofar as its resources allow. The case of *Government of the Republic of South Africa v Grootboom*¹⁹² questioned the core minimum approach extensively and sidestepped the issue by rather determining whether the steps that the state has taken to realise the fundamental right are reasonable. The progressive realisation approach refers to the fact that certain human rights are empowerment rights that enable individuals to benefit from other important rights. This approach was also designed with the UDHR and ICESCR as its basis and the focus of this approach is realising rights systematically as resources become available. This is closer to the approach that the South African Constitutional Court utilised in the case of *Government of the Republic of South Africa v Grootboom*.¹⁹³ The South African Constitutional Court explicitly uses the method of

¹⁹¹ See Chap 6 (Immaterial Property Rights in International Law) Sec 6.4.3.

¹⁹² 2001 (1) SA 46 (CC).

¹⁹³ 2001 (1) SA 46 (CC).

balancing competing rights with some success, especially with reference to socio-economic rights.

There are certain arguments derived from *General Comment Number 17*¹⁹⁴ which hold that trademarks, trade secrets, confidential information and other rights that protect the economic investment of institutional authors and inventors should not be protected as human rights. Furthermore, juristic persons are not permitted to claim that their human rights were violated, although they do have standing to bring human rights claims. This differs from South African law as well as most of the foreign constitutional jurisdictions discussed, since they recognise the fundamental rights of juristic persons. There are arguments that the moral and material interests in intellectual property constitute the minimum levels of protection that need to be afforded by states and that material interests encompass only the narrow economic right to just remuneration. There are arguments that the fundamental right to hold intellectual property should be considered a right separate from property rights.¹⁹⁵ In other words, the intellectual property rights afforded in terms of South African private property law should not constitute exactly the same rights that may enjoy constitutional protection, although property rule-type protection for these moral and material interests would also constitute the provision of adequate protection by the state.

From the general comments interpreting the intellectual property provisions in the ICESCR, three core obligations may be derived and these prevent states from interfering in the moral and material interests of creators; oblige states to protect the works of creators; require states to provide effective remedies in cases where the rights of creators are infringed by unauthorised use; and make provision for the participation of creators in decisions that affect their moral and material interests. This appears to encompass both the constitutional property protection and private law property rule-based protection that is provided to intellectual property in South Africa. According to international law, provisions must also be made for limitations on intellectual property rights and this is done in South African law in terms of the

¹⁹⁴ United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author* (Jan12, 2006) 4 UN Doc E/C12/GC/17 ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

¹⁹⁵ Yu PK 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 709-753 at 733.

deprivation and expropriation provisions of the constitutional property clause as well as built-in limitations in the intellectual property legislation.

The comment also suggests a twofold purpose for the human rights protection of intellectual property, comprising of the function to protect the ‘personal link between authors and their creations and to protect ‘basic material interests which are necessary to enable authors to enjoy an adequate standard of living’.¹⁹⁶ In terms of international law, states are obligated to protect these rights, while any protection above that is viewed as optional. States should keep all the fundamental rights that need to be fulfilled in mind when providing protection to intellectual property rights. The comment also recommends that states should prevent unreasonably high prices for access to essential intellectual property products; prevent intellectual property rights that violate other essential rights; and do a human rights impact assessment before and after implementing intellectual property legislation in order to implement the fundamental right to intellectual property.

South African courts may use these guidelines to determine when intellectual property rights would be protected by the constitutional property clause and when a regulation of property may be permitted. It also gives guidance in instances where the right to intellectual property and other fundamental rights come into conflict.

7 6 Characteristics of Immaterial Property Interests that may be Protected as Constitutional Property

In determining the characteristics of immaterial property that may be protected as property, it is useful to compare the characteristics of immaterial property with those of tangible property to see where the differences and similarities lie. Badenhorst, Pienaar and Mostert¹⁹⁷ identify certain characteristics of property. They state that the concept of property has two different meanings in private law. The first refers to the right in a legal object and the second refers to the object to which the right relates. In viewing property as rights, patrimonial rights are defined as rights to patrimonial objects, which have economic or material value. Things,

¹⁹⁶ United Nations Economic and Social Council *Comment on Economic, Social & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author* (Jan12, 2006) 4 UN Doc E/C12/GC/17 par 2

([http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 18 November 2009)).

¹⁹⁷ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 9-22.

immaterial property and performances are defined as patrimonial objects, with the corresponding patrimonial rights of the right to a thing, immaterial property rights and personal rights for each category. While private law is generally limited to the protection of real relations and corporeal things, the constitutional property clause may recognise and protect *inter alia* real rights, immaterial property rights and personal rights.¹⁹⁸

Badenhorst, Pienaar and Mostert¹⁹⁹ identify corporeality; impersonal nature; independence; susceptibility to human control; and use and value as characteristics of ‘things’. Although the object of a real right was traditionally a corporeal thing, incorporeal things and real rights relating to them have been recognised as property rights in South African legal practice. According to the impersonal nature of a thing, the human body and its parts cannot constitute a thing in the legal sense and is classified as outside of commerce. However, the Human Tissue Act 65 of 1983 makes provision for certain exceptions and provides that ‘exclusive rights’ to the donated body parts are acquired.²⁰⁰ The third characteristic of a thing according to Badenhorst, Pienaar and Mostert²⁰¹ is that the object must constitute an independent entity in law. The juridical independence rather than physical independence of an object is decisive for this characteristic. ‘Incorporeals in the form of other rights only meet the requirement of independence if the requirement is widely interpreted as stating that the needs of legal practice determine what the law regards as independent.’²⁰²

The fourth characteristic of a thing is that it must be susceptible to human control, for example air would only be susceptible to control once it is compressed in a cylinder. Construing this characteristic widely as the possibility to enforce and protect the right as a thing allows for the legal control of corporeal as well as incorporeal things. The final characteristic of a thing is that the object must have use and value, since this is the main reason why humans find it desirable to appropriate certain objects. Value refers to sentimental value as well as economic value. ‘Economic value is not only implicit in corporeals but also in incorporeals.’²⁰³ In summary, a thing is defined as ‘an independent

¹⁹⁸ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 9-13.

¹⁹⁹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 14-22.

²⁰⁰ See Chap 3 (Unconventional Immaterial Property Interests) Sec 3.6.

²⁰¹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 20-21.

²⁰² Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 21.

²⁰³ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 21.

corporeal object (other than human beings) which is susceptible to legal control and which is valuable and useful to a person. Incorporals in the sense of other rights do not meet some of the characteristics of a thing and should be recognised as patrimonial rights serving the function of the object of limited real rights'.²⁰⁴ According to Badenhorst, Pienaar and Mostert, the concept of property in constitutional law is similar to that of private law, but wider. They foresee 'that constitutional law will in future acknowledge and protect as property, in addition to the private law patrimonial rights, also rights against the state to resources or performances not based on conventional property law or even on contract'.²⁰⁵

Intellectual property rights as well as unconventional immaterial property interests that were identified as suitable to be recognised and protected under the constitutional property clause have a number of characteristics in common. These shared characteristics constitute the reason why these interests may be protected as property in constitutional law. All of these interests have inherent economic value or have accrued value for their holder. Labour and money were invested in the creation of these interests. An interest must also be vested in terms of general law before it is possible to recognise it as constitutional property. It may be vested in terms of common law property rules or property-like rules created in terms of legislation. It may also be vested in terms of the rules of another area of private law. There is also no constitutional clause other than the property clause that could potentially provide protection to these interests and as such it is necessary to grant constitutional protection in terms of the property clause, at least in principle. In German law an interest must have the purpose of securing a sphere of personal liberty in the patrimonial field for an individual before it would be recognised and protected as constitutional property, which is a suitable requirement that could also find applicability in South African constitutional law.

²⁰⁴ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 21-22.

²⁰⁵ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 22.

Abbreviations

American ULR	<i>American University Law Review</i>
ASSAL	<i>Annual Survey of South African Law</i>
Boston ULR	<i>Boston University Law Review</i>
Buffalo LR	<i>Buffalo Law Review</i>
Cambridge LJ	<i>Cambridge Law Journal</i>
Cardozo Arts & Ent LJ	<i>Cardozo Arts & Entertainment Law Journal</i>
Cardozo J Int'l & Comp L	<i>Cardozo Journal of International and Comparative Law</i>
Cath ULR	<i>Catholic University Law Review</i>
Chap LR	<i>Chapman Law Review</i>
Chi-Kent LR	<i>Chicago-Kent Law Review</i>
CILSA	<i>Comparative and International Law Journal of Southern Africa</i>
Col LR	<i>Columbia Law Review</i>
Cornell LR	<i>Cornell Law Review</i>
De Rebus	<i>De Rebus</i>
DDT	<i>Drug Discovery Today</i>
Duke LJ	<i>Duke Law Journal</i>
Geo LJ	<i>Georgetown Law Journal</i>
Fordham Intell Prop Media & Ent LJ	<i>Fordham Intellectual Property, Media & Entertainment Law Journal</i>
Ga LR	<i>Georgia Law Review</i>
Ga St ULR	<i>Georgia State University Law Review</i>
Harv JL & Tec	<i>Harvard Journal of Law & Technology</i>
Harvard LR	<i>Harvard Law Review</i>
Ind J Global LS	<i>Indiana Journal of Global Legal Studies</i>
Int & Comp LQ	<i>International and Comparative Law Quarterly</i>
IIC	<i>International Review of Intellectual Property and Competition Law</i>
J African L	<i>Journal of African Law</i>
JBL	<i>Juta's Business Law</i>

JILT	<i>The Journal of Information, Law and Technology</i>
L & CP	<i>Law & Contemporary Problems</i>
L & Phil	<i>Law and Philosophy</i>
Marq Intell Prop LR	<i>Marquette Intellectual Property Law Review</i>
Medical Technology SA	<i>Medical Technology South Africa</i>
Mich St LR	<i>Michigan State Law Review</i>
Minn Intell Prop R	<i>Minnesota Intellectual Property Review</i>
Minn J L Sci & Tech	<i>Minnesota Journal of Law, Science & Technology</i>
MLR	<i>Modern Law Review</i>
NYL Sch LR	<i>New York Law School Law Review</i>
Or LR	<i>Oregon Law Review</i>
Phil & Pub Affairs	<i>Philosophy and Public Affairs</i>
PER	<i>Potchefstroom Electronic Law Journal</i>
San Diego LR	<i>San Diego Law Review</i>
SCRIPT-ed	<i>SCRIPT-ed - A Journal of Law, Technology & Society</i>
SAJHR	<i>South African Journal on Human Rights</i>
SALJ	<i>South African Law Journal</i>
SAMJ	<i>South African Medical Journal</i>
SA Merc LJ	<i>South African Mercantile Law Journal</i>
SAPJ	<i>South African Pharmaceutical Journal</i>
SA Public Law	<i>South African Public Law</i>
SSRN	<i>Social Science Research Network</i>
Stan LR	<i>Stanford Law Review</i>
Sydney LR	<i>Sydney Law Review</i>
Texas LR	<i>Texas Law Review</i>
THRHR	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
UC Davis LR	<i>University of California Davis Law Review</i>
U Chi LR	<i>University of Chicago Law Review</i>
U Cin LR	<i>University of Cincinnati Law Review</i>
U Ill LR	<i>University of Illinois Law Review</i>
Vand LR	<i>Vanderbilt Law Review</i>
Va LR	<i>Virginia Law Review</i>
Wis LR	<i>Wisconsin Law Review</i>
Without Prejudice	<i>Without Prejudice</i>

Yale J Int'l L

Yale Journal of International Law

Yale LJ

Yale Law Journal

Yale LR

Yale Law Review

Yale JL & Human

Yale Journal of Law & the Humanities

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