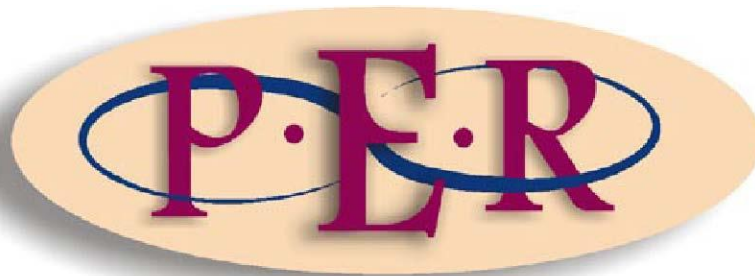


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CONSTITUTIONAL ANALYSIS OF INTELLECTUAL PROPERTY

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1 Introduction

The Constitutional Court has developed a fairly robust methodology for determining the validity of state regulation of new and existing property rights.¹ However, the domain of intellectual property has not received similar attention and recent government proclamations indicate that constitutional challenges to state regulation in this area could arise in the near future.² This article assesses the Constitutional Court's approach to evaluating the legitimacy of state regulation of corporeal property rights and applies these considerations to intellectual property interests, to understand how the approach could and should differ. To this end we canvass the Constitutional Court's treatment of property rights in the face of state regulation and apply the contextual factors that are employed to determine the legitimacy of a deprivation in constitutional property cases to the setting of intellectual property law. We focus on the substantive arbitrariness element of the methodology laid down 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*,³ to ascertain how the Constitutional Court approaches the interaction between the

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¹ First propounded 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* 2002 4 SA 768 (CC), especially paras 46, 100.

² See eg the statements made by Minister of Health Aaron Motsoaledi on the government's intention to curb tobacco proprietors' right to choose their own packaging: Child *The Times*.

³ *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).

state's regulatory actions in pursuing legitimate policy goals and existing property rights in view of the constitutional property clause. Subsequently we turn to two plausible future regulatory deprivations of intellectual property rights, namely the anticipated plain packaging legislation in the realm of tobacco trade marks and the fair dealing exception to copyright for purposes of parody, in an effort to gauge how the current approach of the Court could work out in cases involving intellectual property rights.

2 Constitutional property cases

A good place to start is to consider what the property clause is intended to do, and how. Property rights are "determined and afforded by law and can be limited to facilitate the achievement of important social purposes".⁴ In this spirit, the constitutional property clause aims to "advance the public interest in relation to property".⁵ It therefore prevents the state from abusing its power by arbitrarily depriving persons of their property, or expropriating such property without just and equitable compensation, but it allows the state to pursue valuable social objectives through legitimate regulation of the use of property and, in extreme cases, through expropriation.

This view of the property clause is reflected in the Constitutional Court's approach to determining the legitimacy of alleged deprivations of existing property rights. The Constitutional Court has had the opportunity to consider the application of section 25 (the property clause) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*), to tangible (and even some intangible but relatively "traditional") property interests on a number of occasions. The first decision to formulate a methodology for applying the property clause of the *Constitution*, was that of *First*

⁴ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 33. This limitation is what is referred to as regulation, where the state regulates (and potentially alters and restricts) the content of existing property rights.

⁵ *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) para 64.

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 (hereafter *FNB*).⁶ In his decision, Ackermann J devised a 7-step methodology intended to establish the nature of the interest in question, whether it benefits from constitutional protection by virtue of the property clause, whether there was a deprivation of these property rights, and if so whether the deprivation is permissible in the constitutional context (it must be a justifiable limitation in terms of either section 25(1) or section 36). The methodology proceeds in suitable instances by evaluating, once a justifiable deprivation has been established, whether it amounts to an expropriation and whether just and equitable compensation was paid.

The methodology formulated in the *FNB* decision has been largely followed by the Court in subsequent decisions with little deviation.

The first step determines if the interest in question is in fact a property interest.⁷ Apart from indicating in section 25(4)(b) that property is not limited to land, the property clause does not provide any definition of the property interests it covers. The Court cautioned that it is both practically impossible and judicially unwise to formulate an exhaustive definition of property,⁸ and in most cases it merely (yet safely) accepts that the interests *in casu* are indeed property interests. This approach resonates with the constitutional conception of property, according to which the focus falls on the function that the alleged property has in society rather than the traditional, pre-constitutional conceptions of property.⁹

⁶ *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) (*FNB*).

⁷ *FNB* para 46. A property interest is wider than a property right, but obviously includes a right. Interests can also include entitlements to property (eg a privilege, liberty or power to use particular property) and, arguably, investment-backed expectations. See further *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) paras 61-63; *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) para 84; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd (in Business Rescue)* 2013 ZAGPPHC 259 paras 43-45.

⁸ *FNB* para 51.

⁹ Van der Walt *Property and Constitution* 117-118, 140.

In this regard, there is little doubt that South African law treats intellectual property rights as property interests for constitutional purposes. Certain intellectual property rights have been recognised as such by the Constitutional Court,¹⁰ and this position has been widely accepted by South African commentators,¹¹ despite some initial reservations.¹² Once it is established that an intellectual property interest is of a proprietary nature for the purposes of section 25(1), the investigation moves on to whether or not there was a deprivation of the said property, which is the second step.

The original definition of deprivation - as adopted in the *FNB* decision - simply requires a regulatory interference with the use, enjoyment or exploitation of the property.¹³ The qualifying threshold of this definition has possibly been set slightly higher in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng (KwaZulu-Natal Law Society and Msunduzi Municipality)* (hereafter *Mkontwana*),¹⁴ which refers to a *substantial* interference with the use, enjoyment and exploitation of property by virtue of the state's inherent police power.¹⁵ This stricter qualifying criterion arguably does not amount to anything more than a superfluous semantic distraction, as the *FNB* definition of deprivation logically takes account of the *de minimis* principle and therefore a non-material deprivation will not warrant constitutional engagement.¹⁶ Nonetheless, this stricter definition has been adopted (or at least paid lip-service to) in subsequent constitutional property cases

¹⁰ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International* 2006 1 SA 144 (CC) para 17.

¹¹ Du Bois 2012 *SAMLJ* 177-193; Louw *Ambush Marketing* 544 n 184; Van der Walt *Constitutional Property Law* 143-145; Kellerman *Constitutional Property Clause* 323-332; Dean 2005 *De Rebus* 18-22; Dean *Handbook of South African Copyright Law* 1-3 n 3.

¹² Dean 1997 *THRHR* 105-119.

¹³ *FNB* para 57.

¹⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 1 SA 530 (CC).

¹⁵ *Mkontwana* para 32. Prior to this, the Constitutional Court afforded a wider interpretation to deprivation, saying that it encompasses "any interference with the use, enjoyment or exploitation of private property [emphasis added]": *FNB* para 57. See also Van der Walt *Constitutional Property Law* 204.

¹⁶ Van der Walt "Constitutional Property Law" 281; Van der Walt 2005 *SALJ* 8.

and now seems to be the standard that the Court applies, although it has to be said that the results in those cases seem to confirm the wider *FNB* rather than the narrower *Mkontwana* test.¹⁷ Importantly for intellectual property purposes, it is clear that neither definition requires direct or physical interference with the property; the Court only assesses if the use, enjoyment or exploitation of the property has been diminished.¹⁸ In view of that conclusion it seems obvious that regulatory limitations imposed on intellectual property interests would generally constitute deprivations of property for the purposes of section 25(1).

After it has been established that there has indeed been a deprivation of the property, the third question considered by the Court is if the deprivation complies with the constitutive phrases of section 25(1) of the *Constitution*. This entails four distinct enquiries, namely whether the deprivation is for a public purpose or in the public interest (which is an implicit requirement);¹⁹ whether the deprivation is authorised by law of general application; whether the deprivation is effected in a procedurally arbitrary manner;²⁰ and whether the deprivation is substantively arbitrary. As we show below, each of these distinct enquiries will apply, albeit slightly differently, to the determination of whether or not a regulatory deprivation of intellectual property complies with section 25(1). It is therefore useful to understand how they are applied in the context of corporeal property before undertaking this task in the context of incorporeal property.

The authority requirement primarily ensures that any deprivation is properly authorised by law of general application. Authority is the threshold requirement; unless it is met, the deprivation is unlawful. The authorising law can be any

¹⁷ See eg *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC); *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC).

¹⁸ *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) para 41; Van der Walt *Constitutional Property Law* 263.

¹⁹ Van der Walt *Constitutional Property Law* 225.

²⁰ This requirement is not stated explicitly in s 25(1) but was formulated in *FNB* para 100; see Van der Walt *Constitutional Property Law* 264.

legitimate source of law, including the common law,²¹ but formal legislation is obviously included. It must also be law of general application, which excludes so-called bills of attainder and informal sources such as departmental circulars.²²

Section 25(1) implicitly requires that the alleged deprivation must be for a public purpose or in the public interest, which section 25(2) explicitly requires in cases of expropriation.²³ The deprivation in question must be justifiable in terms of this reading of the property clause when determining whether the deprivation is either substantively or procedurally arbitrary as set out by the Constitutional Court in *FNB*. The Court evaluates if there is a generally sufficient reason for the allegedly infringing provision (or other source of deprivation) when considering the impact that it has on the property rights, which ensures that any interference with existing rights is at least intended to bring about a socially beneficial change.²⁴ This logically implicit prerequisite, an iteration of the constitutional mandate that law should foster positive change, guards against whimsical or capricious regulation of property rights that does not serve the broader interests of society, at the expense of property owners. Deprivations that are aimed at achieving one of the state's core functions, like public health and safety, will self-evidently be legitimate, but a higher level of scrutiny may be appropriate when the regulation falls in a category of state functions that are less obviously legitimate.²⁵ Likewise, the requirement that the deprivation is brought about by law of general application aims to guard against interference with the rights of specific owners, which could clearly also be capricious. There are only a few instances where property owners would have direct recourse to the property clause where the deprivation is suspected of being procedurally

²¹ See *Thebus v S* 2003 6 SA 505 (CC).

²² Van der Walt *Constitutional Property Law* 232-234.

²³ *FNB* para 64; Van der Walt *Constitutional Property Law* 225.

²⁴ The public-purpose enquiry is not necessarily distinct in the sense of being raised earlier in time. The courts mostly consider this aspect as part of the general arbitrariness test, namely when determining what the purpose of the deprivation was: *FNB* para 100.

²⁵ Van der Walt *Constitutional Property Law* 228.

arbitrary,²⁶ none of which are relevant for our current purposes. Accordingly, we devote the remainder of this section to the question of substantive arbitrariness.

The substantive arbitrariness element of the third stage of the methodology aims to prevent the deprivation of property rights where the purpose and the intended outcome of the regulatory regime do not justify the loss or diminution of entitlement(s) suffered by the property owner. This is typically the most gruelling stage of the constitutional assessment of deprivations, as it demands that a "complexity of relationships" be considered to determine the likely effect that the deprivation will have on the rights of property owners, considered against the background of the regulatory scheme.²⁷ The central question comes down to if the relationship or interaction between the source of the deprivation, the ends it seeks to achieve, the nature and extent of the deprivation and the impact of the restrictions it imposes constitutes a sufficient reason for the deprivation. The substantive arbitrariness inquiry tries to answer this question by embarking on a contextual investigation guided by questions as to the nature of the property rights, the purpose of the deprivation, and the various relationships involved (such as the identity of the property holder, the nature of the property, and the nature and extent of the deprivation) to ascertain whether the deprivation complained of can be justified according to the array of factors propounded in the *FNB* decision. These factors are of varying importance, depending on the relevant source of law, the nature of the property right, the importance of the conflicting interests, and the application of the particular law. The Court requires the impact of the deprivation to be justified by the purpose it sets out to achieve and requires the reasons for the deprivation to be weighed against the entitlements that the property owners will consequently be deprived of. The closer the connection between the deprivation and

²⁶ Van der Walt 2012 *Stell LR* 91-92. The most obvious candidates for a procedural arbitrariness enquiry would be deprivations of property brought about directly by legislation, without any administrative action and without judicial oversight. Such deprivations of intellectual property interests can occur as a result of statutory regulation of intellectual property interests, but it is difficult to speculate about their occurrence in the absence of concrete examples.

²⁷ *FNB* para 100.

the reason for it, the stronger the justification for the deprivation will be and the less likely it is to be found arbitrary.

The threshold set by the word "arbitrary" as employed in this step does not constitute a doctrinally concrete standard that can be applied to every case that presents itself. Rather, it is adopted as a flexible concept that takes account of all the relevant factors in the particular instance, as well as the larger constitutional scheme that the South African Bill of Rights fits into.²⁸ This may seem obvious, but it does mean that the standard of justifiability in intellectual property cases may (and probably will) differ from that in traditional property cases because of the scope of the different considerations involved. In some instances, the combination of factors enunciated by the Court in *FNB* will justify a lower level of judicial scrutiny, closer to mere rationality review; in others, something closer to full proportionality review may be required. In the context of traditional property cases, the Court has applied the standard by undertaking a contextual investigation regarding the nature of the right, the person(s) whose property is likely to be affected, the purpose of the deprivation and, importantly, whether there is an appropriate relationship between the means employed and the ends sought to be achieved.²⁹ These factors, also advanced in *FNB*, are aimed at establishing if there is sufficient reason for the deprivation to save it from being substantively arbitrary. The Constitutional Court has subsequently in certain other cases focused the emphasis of its investigation on the question of whether there is a rational connection between the deprivation and the purposes it seeks to achieve, downplaying the complex interplay of factors propounded in *FNB*.³⁰ This approach can be misguided in some cases, where it misses the point of the original factor-laden investigation, namely to contextually establish the strength of justification that is required in the specific instance, but in suitable cases a mere rationality review could indeed be (and has been found to be) sufficient. The elements that make up the true impact on the property owner could cause the threshold to gravitate either towards a rationality-type enquiry on one end

²⁸ Van der Walt *Constitutional Property Law* 246.

²⁹ *FNB* para 100.

³⁰ *Mkontwana* para 51. See also Van der Walt *Constitutional Property Law* 250.

of the spectrum, or a proportionality-type investigation on the other. This obliges courts to analyse the full interplay between the myriad of relevant considerations before determining the required strength of the justification. Naturally, applying a "thin" rationality test will be appropriate where the purpose of the deprivation is quite important, while the deprivation is so slight that nothing more is necessary.³¹ Where the deprivation falls beyond this minimal level of infraction or where the purpose of the deprivation is not all that evident, a "thick" proportionality-type standard is designed to ensure that property owners do not bear an excessive burden without just compensation, a standard that requires the Court to delve deeper into the contextual milieu of the deprivation.³² If the reason for the deprivation is unquestionably significant and the impact on the owner's property benign, a rationality-type enquiry may suffice, but in other cases a proportionality-style investigation will be necessary to determine if the deprivation is really necessary and how important the public purpose that it serves actually is. However, even this evaluation still falls short of the full-blown, second-stage proportionality test resorted to when a deprivation *is* found to be arbitrary and must then, according to the fourth step of the methodology, be justifiable in terms of section 36(1) of the Constitution to be saved from unconstitutionality.³³

The context of the Court's dictum in constitutional property cases reveals the manner in which section 25(1) protects property owners. Firstly, property owners are protected by the formal requirements: any deprivation of property must first and foremost be properly and formally authorised by law of general application that serves a legitimate regulatory purpose. Secondly, the level of scrutiny of regulatory deprivations varies according to the significance of the regulatory goal and the seriousness of the deprivation. When the incident of ownership that is affected is slight, the public purpose involved is overwhelmingly important, or when the deprivation is not enduring, rationality may be a sensible standard to revert to; but

³¹ Van der Walt *Constitutional Property Law* 255.

³² Van der Walt *Constitutional Property Law* 237-241.

³³ However, this second investigation will likely not save a deprivation that has been found arbitrary in any instance, as the applicable standard of justification will necessarily be higher.

when the deprivation has more far-reaching consequences or is for a less-obviously legitimate public purpose with a dubious chance of achieving its aims, it is prudent to adopt the more vigorous proportionality standard to bring the legitimacy of the regulation under stricter scrutiny. The discretion left to the court in this regard should be exercised with due regard for the factors propounded in the *FNB* decision to afford some degree of certainty without compromising the flexibility that is required in these cases.³⁴ Thirdly, the procedural and substantive arbitrariness test ensures that a deprivation of property is not disproportionate. A contextual test guarantees that the effect of the deprivation is commensurate with its legitimate regulatory goal.

What happens if a deprivation is arbitrary according to the test? According to *FNB* it is unconstitutional and invalid unless it can be justified in terms of section 36(1). However, that is unlikely because the procedural or substantive considerations that would render a deprivation arbitrary would also prevent it from being justified in terms of section 36(1). It is therefore improbable that a regulatory deprivation that is found to be arbitrary could be saved by section 36 justification. More importantly, however, the *FNB* approach suggests (and subsequent decisions seem to confirm) that an arbitrary regulatory deprivation cannot be saved by judicially converting it into an expropriation and demanding compensation.³⁵

Finally, according to the *FNB* test a deprivation that is either not arbitrary or, if it is arbitrary, is justified in terms of section 36(1), could be reviewed further in terms of the requirements of section 25(2), since expropriation is a subset of deprivation according to *FNB*. However, since there is no common law authority for expropriation in South African law and since IP rights are almost exclusively created and regulated in legislation, the expropriation issue in IP cases would mostly come up in the form that it adopted in *Agri South Africa v Minister for Minerals and Energy*

³⁴ Van der Walt *Constitutional Property Law* 256; Roux "Property" 24.

³⁵ Known as regulatory taking in US law or as constructive expropriation in South African literature; see in general Van der Walt *Constitutional Property Law* 347ff. See the discussion below.

(hereafter *AgriSA*),³⁶ namely as a question as to whether legislation could either bring about expropriation directly, without administrative action, in terms of the mere promulgation of legislation (this was held not to have been the case according to the *Minerals and Petroleum Resources Act 28 of 2002*,³⁷ but not excluded generally); or, secondly, whether South African law could accommodate constructive expropriation, where the state does not formally expropriate but the regulatory deprivation is said to have such dire effects that it needs to be treated as expropriation and compensated. In the main judgment in *AgriSA* the Constitutional Court either precluded or severely qualified this possibility by stating that expropriation is characterised by the acquisition of the property. In the absence of acquisition (either by the state or someone else) there can be no expropriation. Given the fact that the state would seldom acquire intellectual property interests through regulatory legislation, there seems to be very little chance of constructive expropriation in this area.

3 Intellectual property

It is clear from the above analysis that the Court enjoys considerable discretion in applying the fluctuating standard of justification for deprivations. While this discretion is contingent on the purpose and extent of the deprivation, *Mkontwana's* emphasis on the extent of the deprivation as an indicator of the appropriate standard of scrutiny might downplay the other factors propounded in *FNB*, if followed to the letter.³⁸ A rational connection between the deprivation complained of and the alleged impact it has may be sufficient for minimal deprivations, but this approach could neglect the importance of other considerations that can play a crucial role in the interplay between conflicting constitutional rights, especially when intellectual property interests are involved. This is because, while in both *Mkontwana* and *FNB* the legislation in question was aimed at allowing government to gather taxes (which is clearly a legitimate purpose that falls within the state's regulatory

³⁶ *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

³⁷ *AgriSA* para 69.

³⁸ Van der Walt *Constitutional Property Law* 249.

police power), in the case of regulatory deprivations of intellectual property it is likely that other human rights will also be involved.³⁹

However, the purpose of the property clause must be kept in mind when applying it to intellectual property interests. One obvious factor that sets intellectual property apart from land and one of the causes for a property clause being included in the *Constitution* is that land was previously the subject of extensive state abuse by means of unjust eviction, whereas similar injustices cannot be said to have occurred with intellectual property, or at least not on the same scale.⁴⁰ The property clause was designed, *inter alia*, to foster equitable access to and redistribution of land and other natural resources while providing adequate security to property owners. This shows an implicit recognition that the protection of existing property interests can be subservient to the pursuit of other human rights through the structure and application of section 25. The way that the property clause is applied to minerals and other natural resources again takes account of past injustices and entrenched inequalities, showing an awareness of the requisite differentiation between traditional property interests and less conventional property interests.⁴¹ This redistributive function cannot be transposed to intellectual property per se, and a nuanced approach must be devised to ensure that intellectual property owners benefit from constitutional protection in a way that serves the values underlying and enshrined in the Bill of Rights. This does not mean that the standard of protection granted to intellectual property should be of a lower order. Rather, the spirit, object and purport of the Bill of Rights generally and the property clause specifically mandate that constitutional protection should be awarded in such a manner that it allows state regulation of a similar character to the regulation of tangible property. The property clause is concerned with enabling legitimate state regulation of property interests in South African society, and the body of constitutional property case law has shown the character of regulation that it allows. However, the factors

³⁹ The rights to freedom of expression and health care are often invoked as justification for limiting rights in copyright and patents respectively.

⁴⁰ An argument to this effect could be made in relation to traditional knowledge, but that falls beyond the scope of this paper.

⁴¹ *AgriSA* case.

relevant to the determination of whether state regulation is justified or not should be tailored to the nature and purposes of intellectual property.

One consideration that should feature prominently in the constitutional inquiry as applied to intellectual property is the role of the property rights regime. The purpose of awarding property rights in creative works, inventions, and commercial names and marks is naturally very different from the function of property rights in corporeal property. The private property status of intellectual property rights tends to afford it moral and legal primacy in many parts of the world.⁴² For this reason the property rights category is not in itself helpful when evaluating the legitimacy of state regulation, and relying on it uncritically could even be detrimental to the public interest and the beneficial development and application of the law.⁴³ The Court should be cognisant of this and guard against the unwarranted influence that this categorisation could have in the face of conflict as a result of the inevitable conclusions that arise from this categorisation. However, this is not to say that intellectual property interests should not be treated as property. On the contrary, the property clause can be of great value if it is applied to intellectual property with the requisite differentiation. Notwithstanding, like all property rights, it should be considered in the light of its purpose and reined in accordingly. A myopic vision can be avoided if the purpose of the property rights regime and the constitutional property clause is properly understood. The purpose of the constitutional property clause is instructive in this sense, and should be used to inform the way intellectual property is treated in constitutional cases. The Court must recognise that intellectual property legislation is an instrument of policy and strive to protect the policy

⁴² This is seen in Canadian case law, notably in the decision of *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* 1997 2 FC 306, where the Federal Court of Canada acknowledged the distinction between corporeal and incorporeal property and then promptly ignored the distinction. For a discussion of the detrimental effects of this incorrect categorisation, see Craig *Copyright, Communication and Culture* 208-213.

⁴³ Craig *Copyright, Communication and Culture* 96. To the contrary, see generally Rahmatian *Copyright and Creativity* 1-12, where the author approvingly analyses the property status of copyright works and shows how various analogies between traditional property rights and intellectual property rights can be useful to understanding the functioning of the latter.

objectives accordingly, including cultural, economic and political policy choices that inform the property rights.⁴⁴

A number of things set intellectual property apart from corporeal property and these considerations are crucial to the proper application of the property clause to intellectual property. The most obvious difference is that the objects of intellectual property rights such as copyright and patents are non-rivalrous and non-exhaustive, meaning that the objects of the rights can be enjoyed by more than one person at any given time and will not be extinguished or diminished by their use.⁴⁵ This is in stark contrast to corporeal property. The implication is that the rights in intellectual property are the only things that can be exploited. While an object of property can be physically enjoyed as well as commercially exploited, the only way to meaningfully use an invention or creative work is to exploit the rights commercially. If the intellectual property owner wanted to enjoy her property only privately and not exploit the economic rights awarded to her, state interference with the rights would be of no consequence because the object of the rights can still be enjoyed by the author or inventor. This is clearly not true of corporeal property, where the right of exclusion is essential to the proper private enjoyment of the property. The exclusionary nature of the rights in corporeal property is therefore different from rights in intellectual property. This leads to the next distinction - the *raison d'être* of the property rights regime governing intellectual property. Without exclusive rights in creative works and inventions, there will be no incentive to create such objects (or so the theory goes). Exclusive rights in trade marks again serve a different function, which is taken up below. For constitutional property purposes, this means that the purpose of the system of rights is markedly different from that governing corporeal property, which is designed *inter alia* to regulate scarcity.⁴⁶ It follows that certain rights will be more easily regulated than others, depending on how integral they are to the future creation of similar objects.⁴⁷ As alluded to above, the rights in

⁴⁴ Davies *Copyright and the Public Interest* 237.

⁴⁵ Mossoff "Introduction" xvi; Boyle *Public Domain* 19-20.

⁴⁶ Posner *Economic Analysis of Law* 30-35.

⁴⁷ Eg, as shown below, the right to prohibit certain adaptations of a copyright work is less integral to the incentive to create than the right of reproduction.

intellectual property are primarily of an economic nature,⁴⁸ which must also be taken into account, especially when they conflict with civic rights such as equality or privacy. Any deprivation of intellectual property rights must therefore be conducive to maintaining an adequate incentive to promote a culture of creative and scientific innovation to ensure the sustainability of the intellectual property regime.

These factors are highly relevant to determining if a limitation of intellectual property rights will in fact serve the public interest. Sometimes the public purpose inherent in a limitation will not be clear immediately and a thorough investigation of the aims of the regulatory measure must be undertaken. In some instances, however, the public purpose that is sought to be achieved will *prima facie* constitute a robust justification for the deprivation. One example is the current debate on the constitutionality of plain packaging legislation in the context of trade marks used in relation to tobacco products to promote better public health.⁴⁹ In such a case, is a rationality standard sufficient to take account of all the relevant implications of the deprivation? The summary nature of a rationality enquiry would suggest not. For a rational link to be sufficient, the public purpose would have to be very strong and the deprivation not very extensive, which is arguably not the case with the proposed plain packaging legislation.

With trade marks, the purpose of awarding rights is again different to both corporeal property and other forms of intellectual property. Trade marks primarily serve a distinguishing function,⁵⁰ designed to enable consumers to make an informed choice between different products of the same nature. Some argue that the value of a trade mark can also be constituted by acquired value in the visual elements of a mark.⁵¹

⁴⁸ The moral rights of an author of a copyright work would be one exception, but these rights have no bearing on the legitimacy of state regulation because they are not concerned with the use, enjoyment or exploitation of the property.

⁴⁹ See in this regard Dean 2013 http://blogs.sun.ac.za/iplaw/files/2013/05/Prof-Owen-H-Dean_Inaugural-lecture_15-May_final-version.pdf; Harms 2013 <http://web.up.ac.za/sitefiles/file/47/10568/PLAIN%20PACKAGING%20AND%20THE%20FUTURE%20OF%20TRADEMARK%20LAW.pdf>; Castleman 2013 *Without Prejudice* 60-61; Stilwell 2012 *Without Prejudice* 60-61.

⁵⁰ S 9 of the *Trade Marks Act* 194 of 1993.

⁵¹ Dean 2013 http://blogs.sun.ac.za/iplaw/files/2013/05/Prof-Owen-H-Dean_Inaugural-lecture_15-May_final-version.pdf.

This argument holds that the regulation of the visual elements of a trade mark will cause a diminution in value and consequently constitute a deprivation at the very least. However, given the stated purpose of trade mark law, a court might well allow the regulation of trade marks in the public interest when it is undertaken for a legitimate governmental purpose, such as public health.⁵² However, given the extensive impact that such regulation would have on existing trade marks if the stated purpose were to be achieved, a proportionality-type enquiry that takes account of the efficacy of the proposed measures will be necessary to avert any chance of undue harm to trade mark owners before they are stripped of the value of their marks. If a conflict does arise between public health objectives and intellectual property rights, the policy objectives of both rights could assist the courts in mediating the tension by examining the aims of the regulatory scheme. If the public health measure (the plain packaging legislation) cannot be said to effectively achieve its aims, intellectual property rights should be given their due in trying to achieve their aims by allowing trade mark owners to meaningfully distinguish their particular product from others.

It must be noted that when the policy decision is made to promote public health, the section 25 analysis is completely irrelevant. This becomes relevant only once the decision has been taken, a regulatory scheme has been implemented, and its effects are to be assessed in terms of section 25(1). The reason for this distinction is the fact that section 25 guarantees property interests only negatively, in other words against either improper deprivation or improper expropriation. In the absence of a positive guarantee section 25 kicks in only once there actually has been either a deprivation or an expropriation of property. Prior to that - when policy is debated - the impact that the proposed measures will have on other interests (such as intellectual property interests) can be decided on the basis of a straight-forward balancing and policy-making exercise. General property considerations are relevant here, but section 25 considerations are not. If public health interests are judged to be more important than purely economic interests such as trade marks, the policy

⁵² A 8(1) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994) allows the curtailment of intellectual property rights for the purposes of public health.

will be legitimate if it can be said to be effective in its aims. Only once the policy has been implemented and legislation has been promulgated accordingly does the more complicated section 25(1) exercise of balancing take place with due regard for the complexity of relationships propounded in *FNB*. This is where a particular legislative instrument or provision may be found to be in conflict with the section 25 requirements. This means that the relevant existing property interests must be considered when policy is being debated and the potential impact that the proposed scheme will have on them recognised, but it does not mean that the proposed scheme should be criticised or abandoned merely because it will bring about a deprivation of these interests. Instead, it should be considered whether the regulatory scheme under discussion will bring about an *arbitrary* deprivation of property and, if it does, whether its impact can be mitigated to save it from being unconstitutional on this ground after it has been implemented.

The factors propounded by Ackermann J in *FNB*⁵³ suggest that the Court (and by implication the state when debating policy and drafting legislation) should take into account, before implementing the invasive measures, if less invasive means are available to achieve the intended outcome when the effects of a deprivation are conceivably severe. Although the state is not required to consider less invasive means when pursuing an expropriation, this is justified by the fact that just and equitable compensation is due to the property owner in the case of expropriation.⁵⁴ When the government regulation does not amount to expropriation but still limits the use, enjoyment and exploitation of the property significantly, and strict scrutiny is appropriate, it follows that if less invasive means are available to achieve the same purpose with similar efficacy but less restriction on property rights, this should be pursued before the state is permitted to restrict property rights. Even though the stated government purpose of combating the deleterious effects of tobacco products on public health is legitimate and compelling as an aim, the complexity of relations espoused in *FNB* requires that the full impact of such regulation be assessed. A

⁵³ *FNB* para 100.

⁵⁴ See in this regard Slade 2013 *TSAR* 199-216.

rationality test would therefore not be appropriate, as it may neglect the complicating factors involved.

Various foreign governments have delayed or abandoned their plans to introduce plain packaging measures, citing a lack of sufficient evidence that regulation of this nature will have the desired impact.⁵⁵ The problem with adopting the more cursory rationality standard of review in this case is clear: it allows the state to pursue legitimate aims without ensuring that the means will be effective to achieve the ends, or will even have the best chance out of all of the available options of achieving the objectives, when these objectives are overwhelming in terms of public policy decisions. The propriety of this reasoning is therefore open to questioning, as it could allow burdensome and ineffective regulation. For this reason, once regulatory legislation of this nature has been implemented the court should take all factors into account in its contextual analysis before deciding on the suitable standard of justification. A study of the efficacy of plain packaging will be more advantageous if undertaken before the proposed measures are adopted, as this will present direct evidence of the likelihood of the regulation's achieving its intended goal. Relying on previous studies undertaken by tobacco or anti-tobacco lobbies would not be sufficient to establish the likelihood that such statutory regulation will be effective, given their obvious agendas.⁵⁶ Similarly, diverging conclusions drawn by foreign governments would not be helpful either. An independent study should be commissioned by the Minister of Health to establish the likely effects on intellectual property rights and the likelihood of the measure's being effective before such a measure is adopted. This would substantially improve the chances of such an action being found non-arbitrary when it is implemented and challenged before the Court, as it inevitably will be.

⁵⁵ The United Kingdom decided to delay adopting plain packaging legislation until evidence could be presented that it would be effective.

⁵⁶ See eg Moodie *et al* 2011 *Tobacco Control* 367-373 counterposed against the submission prepared for the UK Department of Health by Philip Morris Limited in 2012: Philip Morris Limited 2012 [http://www.pmi.com/eng/tobacco_regulation/submissions/documents/submission_%20and%20all%20annexes%20\(combined\).pdf](http://www.pmi.com/eng/tobacco_regulation/submissions/documents/submission_%20and%20all%20annexes%20(combined).pdf).

If no such research is conducted, a myriad of factors will inform the evaluation of arbitrariness. One important factor could be the tobacco industry's contentions of the increased likelihood of counterfeit cigarettes being passed off as a particular brand,⁵⁷ and smuggling these counterfeit products could feasibly become easier.⁵⁸ It has also been contended that plain packaging legislation will increase price competition between tobacco proprietors, which could have a counter-productive result by making these products more affordable and thus more available to the youth market.⁵⁹ These factors, as well as the risk of non-compliance with international obligations,⁶⁰ should inform the proportionality-type inquiry in the context of arbitrary deprivation. This is what is meant by "a complexity of relationships" that must be considered within the stricter scrutiny that proportionality entails, to avoid a simplistic determination of the impact that the deprivation that a rationality review would allow could have on the rights of the property owner. This is not to say that a regulatory scheme that brings about a deprivation of property interests is necessarily constitutionally flawed. Only if the deprivation is *arbitrary* will it be constitutionally invalid. This is precisely what the focus on a complexity of relationships seeks to establish by forcing courts to consider the nature and extent of the deprivation, the purpose that it seeks to achieve, and the nature of the property. The culmination of these factors will point to whether or not the regulatory scheme is constitutionally assailable because it is not justified and therefore arbitrary. The mere fact that a deprivation will result is no cause for alarm.

The methodology will not always require such rigorous scrutiny of the regulation. Turning to copyright, a fair dealing exception for the purposes of parody serves as a good example of a case where a rationality standard can be safely adopted as the

⁵⁷ The situation regarding counterfeit goods is regulated by the *Counterfeit Goods Act* 37 of 1997.

⁵⁸ See eg Deloitte 2011 [http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/\\$FILE/medMD8EHAM5.pdf](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/$FILE/medMD8EHAM5.pdf).

⁵⁹ Philip Morris Limited in 2012: Philip Morris Limited 2012 [http://www.pmi.com/eng/tobacco_regulation/submissions/documents/submission%20and%20all%20annexes%20\(combined\).pdf](http://www.pmi.com/eng/tobacco_regulation/submissions/documents/submission%20and%20all%20annexes%20(combined).pdf) 11.

⁶⁰ The Republic of Cuba joined the Dominican Republic, Honduras and Ukraine in filing a dispute with the World Trade Organisation alleging that Australia's plain packaging legislation is inconsistent with their obligations under, *inter alia*, the TRIPS agreement. See WTO 2013 http://www.wto.org/english/news_e/news13_e/ds458rfc_03may13_e.htm.

appropriate standard of justification. The *South African Copyright Act* 98 of 1978 does not currently make an exception for parodists who use an existing work as the target or vehicle for their commentary. If a fair dealing exception for the purposes of parody were introduced, it would in some cases amount to a deprivation of the copyright owners' rights, as the owner would in theory be able to license this use as an adaptation (although foreign case law indicates that it is a very rarely that the owner will in fact license this use).⁶¹ The effect of the proposed provision would be to convert the right that copyright owners currently enjoy to license or object to parodies to a privilege available to all users of copyright works. This would allow any member of the public to use a work that has been made available to the public in a transformative and creative manner to create a new work that uses parody as a medium to take aim at the original, or to use the original to criticise aspects of society more generally.⁶² This article does not address the desirability of this statutory shift, but only its justifiability in terms of the impact it would have on the rights of copyright owners from a constitutional perspective.⁶³

Copyright owners would not be able to prohibit parodying uses of their work as they are able to do currently. The introduction of a parody exception would therefore amount to a regulatory interference with the exploitation of the work, as the owner is able to licence or prevent parodies of her work as the law stands. Even under the conception of deprivation as applied in *Mkontwana*, where a material interference with the use, enjoyment or exploitation of the property is arguably required, preventing copyright owners from objecting to the use of their work as the basis for a derivative parodying work is quite conceivably material. It can therefore be accepted that the proposed exception would constitute a deprivation, as it would deprive the owner of the rights she would otherwise be able to assert in all cases of artistic or otherwise creative parody. Transferring property entitlements (by

⁶¹ See eg *Wright v Warner Bros Inc* 953 F 2d 731 (2nd Cir 1991); *Fisher v Dees* 794 F 2d 432 (9th Cir 1986); *Pro Arts Inc v Hustler Magazine Inc* 787 F 2d 592 (6th Cir 1986). See also generally Patry and Perlmutter 1992 *CAELJ* 667-719.

⁶² For the various ways that a parody can use a work to deliver comment or opinion, see Deazley 2010 *MLR* 790; Merges 1993 *AIPLA QJ* 311-312; Patry and Perlmutter 1992 *CAELJ* 714-715.

⁶³ For a normative justification of the proposed statutory amendment, see Van der Walt and Shay 2013 *SAMLJ* 1-12.

converting the right to prohibit the parodying treatment of a work to a privilege allowing any person to do so) is not problematic for constitutional property purposes, as rights acquired before the constitutional dispensation may be subjected to new or more stringent regulations and control of their use and exploitation.⁶⁴ The realignment of private rights to effect a better alignment with the public interest is exactly what section 25 enables.⁶⁵ All that is required in such cases is that the effect of the new or additional regulation should not be disproportionate in the sense that it should be properly justified and therefore should not amount to regulatory excess.⁶⁶ One of the most important functions of the constitutional property clause is to authorise and legitimate state regulation that would promote constitutional goals.⁶⁷ The substantive arbitrariness investigation is intended to determine if the deprivation in question contributes to constitutionally acceptable aims. Accordingly, it must be justifiable in terms of the provisions of section 25(1).⁶⁸

The exception would deprive owners of a particular right (the right to object to the derivative, transformative use of their works for purposes of creating a parody) only in certain circumstances, and the extent of the deprivation would therefore be very limited. The relationship between the means employed (the exception) and the ends sought to be achieved is of paramount importance; the more loosely connected they are, the closer to the proportionality end of the spectrum the justification needs to be. The purpose of copyright law itself must be considered in conjunction with the guarantee of freedom of expression in section 16 of the *Constitution*, and the two must be reconciled if possible. In this regard, it must be borne in mind that copyright law strives to achieve a balance between incentivising authors to create works for public benefit and limiting the rights granted to these authors in the public interest. The property rights granted to authors are therefore not ends in

⁶⁴ Van der Walt *Property and Constitution* 125.

⁶⁵ Van der Walt *Property and Constitution* 127.

⁶⁶ Van der Walt *Property and Constitution* 127.

⁶⁷ Van der Walt *Property and Constitution* 141.

⁶⁸ For present purposes, the questions of whether there was authority for the deprivation, whether the deprivation was brought about by law of general application and whether it is procedurally arbitrary can be glossed over. If the exception is promulgated by properly enacted legislation, neither of these questions will pose any difficulty.

themselves. They serve as means to promote the creation of valuable works and should extend no further than is necessary to achieve this goal and appropriately reward authors. Limiting owners' rights to prohibit parody could serve this purpose by allowing critical and non-critical transformative uses of copyright works to flourish. Removing the barrier of consent that currently prevents such uses would show a very strong relationship between the means to be employed (the statutory provision that exempts the parodying use of copyright works) and the purpose of the provision (encouraging potential creators to engage in the creative process and promoting the value of free speech). This would tie in with the third factor that Ackermann J set out in *FNB*, namely the relationship between the purpose of the deprivation in question and the person whose property is affected. The affected parties would obviously be copyright owners, regardless of whether they intend to exploit their works for commercial benefit or not. Interestingly, copyright owners who do not wish to capitalise on their works will have their economic (as opposed to moral) rights affected to a similar degree to those who do wish to exploit their works for economic benefit. This is evident from the fact that parodies do not impact on the market for the original, or compete in the same market as the original.⁶⁹ This particular application of the right to authorise an adaptation would not meaningfully add to or detract from the incentive to create, and would therefore leave the prevailing model of copyright law largely untouched. Accordingly, the deprivation in question would have a benign relationship with the exploitability of the works, regardless of the owner's commercial intent.

The Constitutional Court made the sweeping statement that, generally speaking, when the property in question is of a corporeal nature a more compelling purpose will be required to justify the deprivation.⁷⁰ More tellingly, if the alleged deprivation does not extend to all incidents of ownership and only partially to those that it does affect, a less compelling justification can survive constitutional scrutiny. All of the above considerations gravitate towards the rationality end of the spectrum. It then becomes clear that the proposed provision to allow for a parody exception would not

⁶⁹ Patry and Perlmutter 1992 *CAELJ* 693.

⁷⁰ *FNB* para 100.

pose any material threat to the constitutional rights of copyright owners, but rather would contribute to an equitable balance between the intellectual property rights of copyright owners and the public use of copyright works.

This analysis shows how the complexity of relationships should be considered in intellectual property law, where the relevant factors are markedly different from those considered in property cases.

4 Subsidiarity

Having ascertained the constitutional permissibility of a fair dealing exception for the purposes of parody, it should be pointed out that a parody cannot be exempted under the *Copyright Act* as it stands, regardless of the constitutional importance of free speech or the fact that this occurred in the context of trade marks. In *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International* (hereafter *Laugh It Off*),⁷¹ the Constitutional Court made it clear that the value of freedom of expression underlying parody constitutes a legitimate basis for challenging the exercise of intellectual property rights in the context of trade marks. This conclusion was reached without requiring statutory amendment, as the Court was able to read the provisions of the *Trade Marks Act* in such a way that it allowed the parodying uses of trade marks without amounting to infringement. Sachs J stated that allowing parodies of trade marks is not a limitation of property rights, but rather an exercise of balancing competing rights in the Bill of Rights.⁷² This is correct, as the trade mark proprietor is able to exercise her rights uninhibited in the normal course of trade, and the parody does not interfere with this or limit any specific right in the conceptual bundle. The problem is that the *Copyright Act* does not lend itself to similar interpretation, as the parody of a copyright work will

⁷¹ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International* 2006 1 SA 144 (CC).

⁷² If this were a s 25 case, straight-forward balancing would not be appropriate for the reasons given above, as this type of balancing is relevant (as far as economic rights like property are concerned) only in the policy formulation stage. Instead, the balancing of rights would be best undertaken in accordance with the post-deprivation approach in *FNB*.

necessarily constitute at least an adaptation of the original work, an exclusive right that vests with copyright. Copyright owners therefore enjoy the right to prohibit parodies of their works, which cannot be said to be consistent with the values of freedom of expression or congruent with the position in trade mark law. Amending legislation would of course alter this position, as the copyright owner currently enjoys the right to object to the reproduction or adaptation of her work, which a parody would necessarily comprise. The legislation would therefore limit this right (or at least limit its application in certain instances) if it were to legitimate parodies, with the justification resting on the public interest in freedom of expression.

If the issue were brought before a court and the competing rights weighed against each other, the nature of the particular rights could also be instructive. Intellectual property rights, like property rights generally, are purely economic rights, which will often have to bow to civic rights like freedom of expression. This does not mean that a simplistic determination of the relative weights to be given to the conflicting rights is appropriate. This kind of balancing can take place only during a policy debate in the legislature or in the public domain, before legislation is enacted. Once the objectives have been balanced in the policy stage and legislation has been implemented, a more structured judicial balancing exercise should take place in accordance with *FNB*,⁷³ which would indicate whether or not the statutory balance struck by legislation is in line with the constitutional imperatives contained in section 25(1). However, this is quite different from abstractly balancing the freedom of expression with property rights, as section 25(1) determines only whether the statutory regime unjustifiably limits property rights, not vice versa. An important consideration in this regard is the fact that section 25 guarantees property only in the negative, which means that the provision (and the guarantee) is activated only once a deprivation or expropriation of property is on the table. This suggests that an abstract weighing of section 25 property rights against other constitutional guarantees like the freedom of speech is unlikely to occur in the judicial (as opposed to the legislative) context.

⁷³ *FNB* para 100.

The *Copyright Act* is the exclusive regulator of this form of intellectual property rights in South Africa. Once it is accepted that intellectual property, and more specifically copyright, benefits from constitutional protection, it follows that the *Copyright Act* should accord with constitutional values generally and the property clause specifically, despite its pre-constitutional origins. Specifically, the *Constitution* demands that property rights be reassessed to allow unhampered freedom of expression to the extent that copyright owners are no longer able to wield the (presumably unintended) sword of private censorship of others' views of their works. Awarding copyright owners a property right to prohibit creative criticism of their works devalues the constitutional guarantee of freedom of expression as well as the very objectives that underlie copyright law, and can even be said to prevent citizens from actively participating in our constitutional democracy by unjustifiably suppressing divergent voices. The constitutional demand for legislative development is clear, in the absence of which there can be no exemption of this form of speech.

While the parody of works that have been made available to the public is clearly an embodiment of the constitutionally guaranteed right to freedom of expression, as reflected in the *Laugh It Off* decision, the legislature should not be fooled into thinking that section 16 of the *Constitution* affords adequate protection in the context of copyright. The principle of subsidiarity precludes this right from being invoked in the absence of a specific legislative provision that gives it embodiment, save for where the Act is alleged to be unconstitutional. In the *Laugh It Off* case the defendant was able to rely on an existing provision in the *Trade Marks Act*, which, informed by section 16, proved a valid defence that he had in fact not infringed the property rights of the trade mark proprietor. This cannot be the case in a copyright action, as a parody will not easily fit into the structure of any of the existing exempting provisions. Trade mark owners are protected from the dilution of their marks, while copyright owners are protected from any unauthorised uses of their works that are not explicitly exempted. Accordingly, the court will not be able to apply section 16 directly to exempt users' conduct, regardless of the legitimacy of the parody, and must merely apply the statutory content and limitations that the *Copyright Act* provides. Pre-constitutional legislation necessarily does not have the

imputed legislative intention of advancing constitutional principles, which means that sometimes legislation will have an incongruent relationship with the values that an open and democratic society strives to achieve.⁷⁴ In cases of legislation predating the constitutional era, the subsidiarity principles are used to test the validity of legislation and common law rules for constitutional compliance. In the interest of adhering to the principles of subsidiarity as established by the Constitutional Court, legislation that does not adequately recognise a value, rule, principle or right enshrined in the *Constitution* must be made to accommodate the neglected interest. Of the various ways in which this can be achieved, the only avenue that avails itself to the issue under discussion is legislative amendment.⁷⁵ Balancing property and other constitutional rights must occur when proper judicial interpretation fails to resolve the conflict and the legislation in question blatantly neglects a valuable civic right.⁷⁶ It is obvious that the *Copyright Act* - promulgated in 1978 and only scantily revisited since - was not intended to give effect to a constitutional right or value, and thus exposes itself to purposive interpretation or, failing that, to direct challenge.⁷⁷ Allowing parodying uses of a copyright work cannot meaningfully be "read in" to the *Copyright Act* in the absence of an explicit fair dealing exception, meaning that purposive interpretation will be a stretch. For this reason the appropriate balancing exercise cannot lead to the resolution of the conflict. The issue is therefore not one that can be addressed at the legislator's convenience, as evidenced by the constitutional justifications for the exception advanced above and the growing need for this expansion of creative freedom.⁷⁸ Short of a very determined parodist bringing the issue to the Constitutional Court's attention, the legislation will continue to act as a deterrent to all burgeoning parody artists.

⁷⁴ Van der Walt *Property and Constitution* 67; Van der Walt 2008 *CCR* 101, 104.

⁷⁵ There is no room in s 12 of the *Copyright Act* 98 of 1978 to "read in" the required exception, even under the awning of criticism or review. For a discussion of why this is the case, see Van der Walt and Shay 2013 *SAMLJ* 10. Reading down will also not be feasible, as the rights granted to copyright owners (in particular, the rights of reproduction and adaptation) cannot be meaningfully limited only in certain instances by judicial interpretation, as will be required in the present case. Legislative involvement then becomes inevitable.

⁷⁶ Van der Walt *Property and Constitution* 44.

⁷⁷ Van der Walt *Property and Constitution* 40-41.

⁷⁸ See Van der Walt and Shay 2013 *SAMLJ* 1-12.

5 Conclusion

The above analyses show that constitutional property case law can be helpful in determining the legitimacy of state interference with intellectual property rights, but not without the requisite differentiation. The purpose of the various systems of property rights must be kept in mind when considering how they interact with the property clause, and the underlying rationales for awarding rights should direct the standard of justifiability that state regulation must meet. The different underlying objectives of the statutory regimes governing copyright and trade mark law respectively illustrate this point in the context of intellectual property. Due emphasis on the purpose of awarding property rights in immaterial objects will ensure that the incentives that these rights provide are kept intact and the function that the property regime serves in society is maintained. The property clause can be a guiding force in ensuring that intellectual property interests are given due regard when unrelated policy objectives compete with vested interests in intellectual property. Markedly different considerations will necessarily be relevant in copyright and trade mark law respectively, and it will be interesting to see how the Constitutional Court applies the methodology propounded in *FNB* to issues of intellectual property. It is imperative that the Court does not get caught up in the strictures of property language, but rather recognises it as a useful analogy that conveys the importance of the rights in question and the place they have in ordering relationships in society. The same basic function of ensuring that state interference with vested (intellectual) property rights can still be served if the property clause is understood in this way.

BIBLIOGRAPHY

Literature

Boyle *Public Domain*

Boyle J *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press Yale 2008)

Castleman 2013 *Without Prejudice*

Castleman A "Plain packaging" 2013 *Without Prejudice* (Jun) 60-61

Child *The Times*

Child K "Joy Greets Aussie Smoking Ruling" *The Times* (16 August 2012) available online <http://www.timeslive.co.za/thetimes/2012/08/16/joy-greets-aussie-smoking-ruling> accessed 12 November 2013

Craig *Copyright, Communication and Culture*

Craig CJ *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar Cheltenham 2011)

Davies *Copyright and the Public Interest*

Davies G *Copyright and the Public Interest* 2nd ed (Sweet & Maxwell London 2002)

Dean 1997 *THRHR*

Dean OH "The case for the recognition of intellectual property in the Bill of Rights" 1997 *THRHR* 105-119

Dean 2005 *De Rebus*

Dean OH "Trade mark dilution laughed off" 2005 *De Rebus* (Oct) 18-22

Dean *Handbook of South African Copyright Law*

Dean OH *Handbook of South African Copyright Law* (Juta Cape Town 2012)

Deazley 2010 *MLR*

Deazley R "Copyright and parody: Taking back the Gowers Review?" 2010 *MLR* 785-823

Du Bois 2012 *SAMLJ*

Du Bois M "Intellectual property as a constitutional property right: The South African approach" 2012 *SAMLJ* 177-193

Kellerman *Constitutional Property Clause*

Kellerman M *The Constitutional Property Clause and Immaterial Property Interests* (LLD-thesis Stellenbosch University 2010)

Louw *Ambush Marketing*

Louw AM *Ambush Marketing and the Mega-Event Monopoly: How Laws are Abused to Protect Commercial Rights to Major Sporting Events* (TMC Asser Press The Hague 2012)

Merges 1993 *AIPLA QJ*

Merges RP "Are you making fun of me? Notes on market failure and the parody defense in copyright" 1993 *AIPLA QJ* 305-312

Moodie *et al* 2011 *Tobacco Control*

Moodie C *et al* "Young adult smokers' perceptions of plain packaging: A pilot naturalistic study" 2011 *Tobacco Control* 367-373

Mossoff "Introduction"

Mossoff A "Introduction" in Mossoff A (ed) *Intellectual Property and Property Rights* (Edward Elgar Publishing 2013) ix-xxii

Patry and Perlmutter 1992 *CAELJ*

Patry WF and Perlmutter S "Fair use misconstrued: Profit, presumptions, and parody" 1992 *CAELJ* 667-719

Posner *Economic Analysis of Law*

Posner RA *Economic Analysis of Law* 3rd ed (Aspen New York 1986)

Rahmatian *Copyright and Creativity*

Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar Cheltenham 2011)

Roux "Property"

Roux T "Property" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa III* 2nd ed (Juta Cape Town 2003) ch 46

Slade 2013 *TSAR*

Slade BV "The less invasive means argument in expropriation law" 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 199-216

Stilwell 2012 *Without Prejudice*

Stilwell V "Unbranded cigarettes" 2012 *Without Prejudice* (Oct) 60-61

Van der Walt 2005 *SALJ*

Van der Walt AJ "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" 2005 *SALJ* 75-89

Van der Walt 2008 *CCR*

Van der Walt AJ "Normative pluralism and anarchy: Reflections of the 2007 term" 2008 *CCR* 77-128

Van der Walt "Constitutional Property Law"

Van der Walt AJ "Constitutional Property Law" in Visser C (ed) *Annual Survey of South African Law* (Juta Cape Town 2010) ix-xxii

Van der Walt *Constitutional Property Law*

Van der Walt AJ *Constitutional Property Law* 3rd ed (Juta Cape Town 2011)

Van der Walt *Property and Constitution*

Van der Walt AJ *Property and Constitution* (PULP Pretoria 2012)

Van der Walt 2012 *Stell LR*

Van der Walt AJ "Procedurally arbitrary deprivation of property" 2012 *Stell LR* 88-94

Van der Walt and Shay 2013 *SAMLJ*

Van der Walt AJ and Shay RM "Parody as a means to advance the objectives of copyright law" 2013 *SAMLJ* 1-12

Case law

Canada

Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) 1997 2 FC 306

South Africa

African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd (in Business Rescue) 2013 ZAGPPHC 259

Agri South Africa v Minister for Minerals and Energy 2013 4 SA 1 (CC)

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)

Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International 2006 1 SA 144 (CC)

Law Society of South Africa v Minister for Transport 2011 1 SA 400 (CC)

Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng 2005 1 SA 530 (CC)

National Credit Regulator v Opperman 2013 2 SA 1 (CC)

Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 1 SA 293 (CC)

Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 6 SA 391 (CC)

Thebus v S 2003 6 SA 505 (CC)

United States of America

Fisher v Dees 794 F 2d 432 (9th Cir 1986)

Pro Arts Inc v Hustler Magazine Inc 787 F 2d 592 (6th Cir 1986)

Wright v Warner Bros Inc 953 F 2d 731 (2nd Cir 1991)

Legislation

Constitution of the Republic of South Africa, 1996

Copyright Act 98 of 1978

Counterfeit Goods Act 37 of 1997

Minerals and Petroleum Resources Act 28 of 2002

Trade Marks Act 194 of 1993

International instruments

Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)

Internet sources

Dean 2013 http://blogs.sun.ac.za/iplaw/files/2013/05/Prof-Owen-H-Dean_Inaugural-lecture_15-May_final-version.pdf

Dean OH 2013 *Deprivation of Trade Marks Through State Interference in their Usage - Inaugural Lecture Delivered at Stellenbosch University on 21 May 2013* http://blogs.sun.ac.za/iplaw/files/2013/05/Prof-Owen-H-Dean_Inaugural-lecture_15-May_final-version.pdf accessed 12 November 2013

Deloitte 2011 [http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/\\$FILE/medMD8EHAM5.pdf](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/$FILE/medMD8EHAM5.pdf)

Deloitte 2011 *Illicit Trade of Tobacco in Australia: A Report Prepared for British American Tobacco Australia Limited, Philip Morris Limited and Imperial Tobacco Australia Limited* [http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/\\$FILE/medMD8EHAM5.pdf](http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO7WZEX6/$FILE/medMD8EHAM5.pdf) accessed 12 November 2013

Harms 2013 <http://web.up.ac.za/sitefiles/file/47/10568/PLAIN%20PACKAGING%20AND%20THE%20FUTURE%20OF%20TRADEMARK%20LAW.pdf>

Harms LTC 2013 *Plain Packaging and its Impact on Trade-Mark Law* - Lecture Delivered at the University of Pretoria on 13 March 2013 <http://web.up.ac.za/sitefiles/file/47/10568/PLAIN%20PACKAGING%20AND%20THE%20FUTURE%20OF%20TRADEMARK%20LAW.pdf> accessed 12 November 2013

Philip Morris Limited 2012 [http://www.pmi.com/eng/tobacco_regulation/submissions/documents/submission%20and%20all%20annexes%20\(combined\).pdf](http://www.pmi.com/eng/tobacco_regulation/submissions/documents/submission%20and%20all%20annexes%20(combined).pdf)

Philip Morris Limited *Standardised Tobacco Packaging will Harm Public Health and Cost UK Taxpayers Billions: A Response to the Department of Health Consultation on Standardised Packaging of Tobacco Products* http://www.pmi.com/eng/tobacco_regulation/submissions/documents/submis

sion %20and%20all%20annexes%20(combined).pdf accessed 12 November 2013

WTO 2013 http://www.wto.org/english/news_e/news13_e/ds458rfc_03may13_e.htm
 World Trade Organisation 2013 *News Report*
http://www.wto.org/english/news_e/news13_e/ds458rfc_03may13_e.htm
 accessed 12 November 2013

LIST OF ABBREVIATIONS

AIPLA QJ	AIPLA Quarterly Journal
CAELJ	Cardozo Arts and Entertainment Law Journal
CCR	Constitutional Court Review
MLR	Modern Law Review
SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
WTO	World Trade Organisation

CONSTITUTIONAL ANALYSIS OF INTELLECTUAL PROPERTY

AJ Van der Walt* and RM Shay**

SUMMARY

This article analyses the Constitutional Court's treatment of property interests in the face of state regulation to gain an understanding of the type of state interference that is justifiable in terms of section 25(1) of the Bill of Rights. This is done by examining the Constitutional Court's dicta relating to the meaning of deprivation and how these inform the meaning of property in the constitutional context. The methodology that the Constitutional Court has formulated to assess if state interference complies with the provisions of section 25 is explained to show the type of state regulation that has been found legitimate. We then consider how this understanding of constitutional property and the state's legitimate exercise of its inherent police power interact in the setting of intellectual property by contrasting the various policy objectives underlying the different statutory regimes governing intellectual property. This theoretical analysis is then applied to two contemporary examples of feasible state interference with existing intellectual property interests, namely the proposed plain packaging measures which severely restrict the use of tobacco trade marks, and a fair dealing exception allowing the use of copyright works for the purpose of parody. These examples serve to illustrate the context and manner in which intellectual property interests may come before the Court and the necessary differentiation with which these interests should be treated. The

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appropriate judicial assessment of the true impact that state action could have on vested property interests is explained and contrasted with the balancing exercise that is employed at the earlier stage of policy making. This discussion is concluded by highlighting some of the interpretational issues that will arise and how some constitutional values could be curtailed in the absence of legislative intervention.

KEYWORDS: Intellectual property law; constitutional property law; constitutional property clause; trademarks; copyright; parody; plain packaging; subsidiarity; deprivation; regulation; substantive arbitrariness