

Adams & Adams #Crammer17: insights into intellectual property

By  Leigh Andrews

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The Adams & Adams 'Crammer' session, recently held in Cape Town and Sandton, was aptly named as they crammed as much content as possible into the morning session in intense, 20-minute increments on the balancing act of copyright and freedom of speech as well as who really owns that IP.



Image © : [Adams & Adams #Crammer17](#)

Adams & Adams partner and patent attorney Philip Pla kicked off the session by introducing guest speaker Michael Charton who shared his story, *My Father's Coat*, in two parts. It has been a long time coming for Charton, ever since reading Alan Paton's *Cry the Beloved Country*, which opened his eyes to what he calls "the true human tragedy of South Africa," while he was procrastinating as a student.

Time-travelling through the unique SA IP framework

The 200-pager literally changed Charton's life as it left him filled with angst and led him to study history after completing his chartered accountancy qualification. It led him to write a story of five interwoven tales and how the country developed despite different languages from when the world's first publicly traded company, the Dutch East India Company appeared on our shores in 1652 on a one-way ticket, as reluctant pioneers.

“ [@Michael_Charton](#) sharing the fascinating story of South Africa at [#Crammer17](#) at 15 on Orange [@CityofCT](#) [#MyFathersCoat pic.twitter.com/Tu5D2OVJRO](#)— Adams & Adams ([@AdamsAdamslaw](#)) [October 25, 2017](#) ”

Charton has a compelling presentation style and shared such compelling nuggets as the fact that the Bible was the only book Paul Kruger ever read and he insisted the earth was flat, with drinking and even dancing forbidden in Pretoria under his rule. Charton made it clear that there are so many perspectives on every story, particularly in South Africa where he says we only truly felt nationalism across all race groups when Nelson Mandela came to power.

Our eyes are finally being opened to the complexity of our story, which is “made up of many bloodstained tapestries,” and

we're only beginning to grapple with understanding cultural diversity. Charton said it's time to learn from the errors of our past and its legacy, and to pass along that accumulated legacy to the next generation.

Following Charton's two-parter we hit the fast-forward button to 2017, where Pla moderated a panel discussion in which professionals from the Adams & Adams team discussed intellectual property right issues and opened debate on the most significant legal developments of the year.

Does authorship equate to ownership?

First up was copyright lawyer Darren Olivier, who shared the SABC copyright vs freedom of speech case, as a present day example of monopolies. He posited the following: If, as an investigative journalist, you present an idea to a media house, which commissions it, you go ahead with the research only to discover something remarkable, yet they decide in the end not to publish the work – should you still have a right to publish it yourself?

That's what happened in the case with Via Vollenhoven's *Financial Spear/If Truth Be Told* investigation. The SABC cited the following as their reasons for not taking the work filmed by Vollenhoven to air: The work was of unacceptable quality, featuring unbalanced reporting, excessive reliance on a single source, and incrimination of public figures without offering them right of reply, which opened the liability for a defamation case.

Vollenhoven argued in response on constitutional grounds – that they had a right to freedom of expression and should be able to keep a copy of the footage to distribute it themselves. This puts the 39-year-old Copyright Act in the spotlight.

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South African Copyright Alliance voices concerns over proposed Copyright Amendment Bill

25 Jul 2017



Olivier calls it a red herring, as the Copyright Act doesn't affect our right to tell a story. The 'right' in copyright is a positive as it lets you reproduce work and adapt it for broadcast, so you'd think Vollenhoven is in the clear here – except that the judge felt the raw footage was part and parcel with the final product as commissioned in. So while authorship was indeed with Vollenhoven, ownership remained with the SABC.

“ Had a legal audit on Basotho cultural property been carried out earlier, it's IP could have been better protected [@DarrenTOlivier #Crammer17 pic.twitter.com/MLg5lxyNV6](#)— Adams & Adams (@AdamsAdamsLaw) [October 25, 2017](#) ”

Olivier says to keep the following in mind regarding copyright:

- Copyright is a property right.

- Copyright is powerful.
- Contractual arrangements are important.

With this in mind, it's interesting to question whether copyright trumps freedom of speech and if authorship equates to ownership, especially in 2017 where anything can be shared on social media – whether you're the author, owner or other.

Let's twist again... The soft drink wars

Senior associate and trade lawyer Wensel Britz was next at the podium, speaking of the Pepsi Twist case. He began with a reminder that Atlantic Industries or Coca-Cola has owned the trademarks for Lemon Twist, Twist and Diet Twist since the 1970s and 1980s. Pepsico then tried to register Pepsi Twist in the early 2000s. Understandably, Coca-Cola opposed these applications, with Pepsi counterattacking on the definition of 'twist' as a slice of lemon or mix of liquids to make a drink in the high court.



Image © :Adams & Adams #Orammer17

The findings were interesting, as the cancellation was dismissed as market survey evidence and evidence of sales both point to Twist as being one of the most recognisable soft drink marks in SA associated with Coca-Cola products, with the opposition also dismissed as it was argued that Pepsi itself is so well-known and distinctive that no reasonable person would be confused that Pepsi Twist is a Coca-Cola product. But the reasonable consumer would wonder if the Coke and Pepsi twists had a common origin.

Coca-Cola was unhappy with the high court's decision and so, the matter went to the Supreme Court of Appeal. There, the decision of the full bench held that despite the meaning of 'twist' – an ordinary word used as a verb – it's now a slang word and the lemon and mix definitions are actually slang and not known by a large section of SA consumers. It's akin to an invented word that doesn't actually hold for either beverage – only through Coca-Cola's long-standing use of the word in its beverage marks.

The Court also reiterated that PepsiCo's mark contained the distinctive feature of Coca-Cola's marks, and that the words 'Pepsi' and 'Twist' enjoyed at least equal prominence on the labelling. So as a direct competitor brand, the likelihood of confusion was actually established.

Britz concluded with the following prime points for brand owners:

- Ordinary words, which are arbitrary when applied to certain products, can be good trademarks.
- "Allusive" or metaphorical marks may also be good trademarks – but you may have to fight for them.
- Sub-brands do have a unique and important function in identifying your product.
- Attaching your house mark to an existing mark with a reputation may not be sufficient to negate confusion.
- While companies focus on their main house brand, sub brands can function as a separate indication of your

business in their own right.

The monkey who took a selfie with the camera set-up: Sure I own it! Don't I?

In another favourite session of the day Philip Pla and Charne le Roux of Adams & Adams spoke on the complicated issue of the crux of ownership of intellectual property rights and potential pitfalls, especially where copyright is concerned.

“ And now for some 'Monkey Business' at [#Crammer17](#) Cape Town! Phil Pla and Charne Le Roux discuss [#copyright](#) in the [#MonkeySelfie](#) pic.twitter.com/dKAfl8CpOX— Adams & Adams (@AdamsAdamsLaw) [October 25, 2017](#) ”

First up was the example of David Slater and the macaque monkey 'selfie'. Slater set up his tripod in Indonesia, and Neruda the monkey took hold of the camera controller and snapped away. All went well until the Wikimedia Foundation published the images in their image library.

In what Le Roux dubs 'a bizarre subplot', Peta demanded the images' copyright be assigned to the monkey and that Peta be appointed as administrators. Slater was drawn in and had to pay for his legal representation. The case has finally settled, and Slater awarded 25% of all proceeds of the photos to a fund set up for the monkeys.

How would this pan in SA, on the ownership of a photograph? Le Roux said here you look at author and owner separately. Only a natural person or person with jurisdiction is classified as the author, and the person with jurisdiction includes the person who controls or directs the making of the work.

This is sticky ground as **the photo author is the person responsible for its composition, not necessarily the person who pushes the button**, so Le Roux says this specific case may well have fallen through in SA. On copyright, there's a general rule that ownership follows authorship with an exception around commissioned work: As the commissioner of the work, you are also the owner.

Le Roux and Pla say to get advice on what you can lay claim to early on rather than trying to unscramble the egg too late down the line. They shared the following tips in this regard:

- Negotiate upfront and record agreement regarding ownership in writing.
- Check employment contracts.
- Keep records of the creation process.
- Get affidavits from the authors.
- Remember that not all commissioned works are covered by exceptions.

Are you thinking out of the box or boxed in with your brand packaging?

The Crammer session ended with a session from Adams & Adams senior associate Alissa Nayanah on the future of packaging disputes with a word from Gail Schimmel of the resurgent Advertising Standards Authority (ASA).

Nayanah said as creative marketers, we need to avoid disputes over packaging design complications without killing the creative spirit. The two biggest enemies in this regard are obviously your competitors, and not quite so obviously, the consumers who will claim your packaging is misleading. This is why you need to ensure you comply with traditional intellectual property regulations for the product.

“ We end off our [#Crammer17](#) Cape Town event with an IP favourite 💎💎 thanks to [#JackDaniels](#) and Alissa Nayanah! Traditional forms of IP. pic.twitter.com/sgOxzpZDh— Adams & Adams (@AdamsAdamsLaw) [October 25, 2017](#) ”

Keep calm and arm yourself, says Nayanah. First up is to reacquaint yourself with the traditional forms of IP: The design, trademark and label count as the artistic mark covered by copyright, and can garner goodwill and reputation in the get-up.

Your first weapon against competitors is thus to register those trademarks. Nayanah recommends doing so in various forms, almost ‘on the offensive’, as clever competitors will borrow elements of your packaging, not the whole thing. So brands need to dissect their packaging and then register as many of those design elements as possible.

The next weapon in your arsenal is your brand’s reputation, which is earned by extensive use of packaging. As evidenced in the Pepsi Twist case Britz illustrated, you may need to prove your brand has a reputation that consumers associate exclusively with you, so steer clear of common elements in the trade from the start.

Nayanah says the biggest problem here is being unable to prove you own the brand elements. You need to start on this as early as when sending a brief on to the design agency and keep the authorship/ownership issue in mind – just because you paid for it, doesn’t mean you own it.

Tips for registering brand trademarks

- Deconstruct your packaging and register each element separately as a trademark.
- You can register a specific design if it’s original and unique to the product.
- Avoid elements common in the trade or colours in common use.
- Use the copyright ‘C’ and registered ‘R’ symbols for your IP.
- Register each new design.
- Be vigilant!

On the issue of **regulatory compliance**, Nayanah said it’s all about protecting the consumer and making sure your products don’t mislead them. In these cases, the laws to look to depend on the actual product, and those that can cause significant harm to the consumer – like medicines and alcohol – are the most heavily regulated.

So your brand needs to be au fait with the **legislation**, as well as the Consumer Protection Act (CPA) and the product - or industry-specific laws, the SABS **standards**, as required by CPA, and **self-regulatory codes** like those of the Industry Association for Responsible Alcohol Use (ARA) and the ASA – you need to take all of that into account with your packaging design.

To illustrate this, Nayanah played a video by Gail Schimmel, acting CEO of the ASA:

In it, Schimmel spoke of the fact that the ASA went into business rescue in October last year and was R5.5m in debt with no upfront funding system when she joined in June 2017. She reminded the industry that the alternative to this form of regulation is government regulation, which she says, “no marketer or lawyer wants.”



ASA may rule on the advertising of non-members

3 Oct 2017



While the ASA's future is not guaranteed, it can get there with the industry's help. The first step was to request pre-paid filing fees for complaints marketers may lodge later – this resulted in R5m of the R8m the ASA was hoping for. Schimmel says the next phase involves putting a [voluntary 0.1% levy payment](#) on all advertising, payable at the media-buying agency.



ASA launches levy system

6 Nov 2017



Nayanah concluded with a reminder of the risks of noncompliance:

- It's a criminal offence punishable through fine, imprisonment or both.
- There are actually inspectors on the streets checking for packaging regulatory compliance who can seize goods and file criminal complaints.
- If your competitors realise you're not completely compliant, they can sue for unlawful competition.
- It can be on as little as two weeks' notice that you need to recall all misleading packaging and rebrand.

Ample reason to become familiar with the regulations at the package design stage, to know your trade and the industry norm, and to stay away from anything too similar to what's already out there. Get your packaging vetted before launch!

[Click here](#) to view presentations from the Cape Town and Johannesburg sessions as well as a gallery of images from the sessions, and follow Adams and Adams [on Twitter](#) for the latest updates.

ABOUT LEIGH ANDREWS

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