

Protect your intellectual capital

By [Dale Verster](#)

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Dale Verster, an associate at commercial law firm Bowman Gilfillan, points out that the law does not grant protection for something that does not belong to anyone; nor can such protection be obtained for something that is not new. He was commenting on the fact that the vuvuzela is unprotected as an idea.

Protection for a registered aesthetic design can be received for the article's shape, configuration, pattern and ornamentation (or any combination of these factors) provided it is both new and original.

An article is deemed new if, on the date of filing, it did not form part of the state-of-the-art immediately before registration or on the date of issue, whichever date is earliest. By 'state-of-the-art' is meant all relevant material available to the public by written description or use. A patent has similar requirements, in that it can be received for something that is new, inventive and would have industrial application.

The essential difference between a patent and design is one whereby a patent protects an underlying concept, while the registered design protects the visual appearance of an article. In certain instances patent and design protection can be received for the same article.

Vuvuzela not unique

However, in the case of the vuvuzela, the concept of a device through which a noise is created by blowing into it would have been superseded by numerous prior horns. It would therefore not be patentable.

Nevertheless, he maintains that the vuvuzela could possibly have been protected as a registered design, though the scope of protection would have been severely limited.

At the date of its original release some years back, it is probable that the actual shape of the vuvuzela was new and original. If not, the proprietor could have altered its shape and configuration, added a pattern or included some form of ornamentation to the article to make it new and original. Design protection would therefore have been possible.

However, since the release of the first vuvuzela in the form we now recognise, numerous variations exist. This further hampers the possibility of receiving a valid design registration as the scope for 'new and original' is that much narrower.

The net result is an influx of numerous variations of vuvuzelas onto the South African and world markets, with no one proprietor staking a claim to aspects of the article, with the resultant right to limit its importation or distribution in South

Africa.

Hence, there is no registered protection for the vuvuzela in South Africa and the chance of there ever being such protection is reduced every time a new variation is introduced into the market.

This serves as a reminder to proprietors of new articles to seek some form of protection for new and original articles to afford the proprietor the means to restrict use of an article. Such use may become valuable, even if it deafens you in the process.

ABOUT THE AUTHOR

Dale Verster is an associate at commercial law firm Bowman Gifillan.

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