IP BRIEFS

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FROM THE EDITOR

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The controversial Copyright Bill has spent most of the year in the corner of the President's desk, but the significant lobbying efforts of various stakeholders, including submissions to the President regarding the unconstitutional process that was followed in getting the Bill to its current position, seems to have gained some traction. It is most likely that President Cyril Ramaphosa will send the Copyright Amendment Bill back to Parliament, following recent reports that the USA is reviewing SA's preferential access to its markets, and that it could suspend SA from a trade-preference programme due to concerns voiced by a number of industries about the proposed new regime of copyright law. Sports, Arts & Culture Minister Nathi Mthethwa has reportedly recommended to the President that both the copyright Bill and the Performers' Protection Amendment Bill need reworking.

We will keep a close eye on the further amendments.

As we are dusting our Christmas trees and lighting up our homes (Eskom permitting!), we wish all our readers a blessed and safe Festive Season.

The South African weather patterns are quite unpredictable this year and I believe an unexpected white Christmas is awaiting Cape Town!

Quote for today:

"Science does not know its debt to imagination."

– Ralph Waldo Emerson

Imagine a world without AI… innovative challenges

Stephen is a patent attorney at Von Seidels known for expertise in protecting complex, computer-implemented inventions, both locally and abroad.

https://science.howstuffworks.com/artificial-intelligence-machine-learning-methodology.htm

There has been much debate since the rise of the DABUS inventor recently about whether an AI system can be listed as an inventor on a patent application. Academics from the University of Surrey filed two patent applications for inventions listing the "DABUS System" as the inventor.

Inventive AI challenges the existing patent systems in more than one way. "AI inventions" are inventions made by humans that use artificial intelligence to solve problems ranging from how to buy a pair of pyjamas using a virtual assistant through to improving efficiencies in metal refineries. The challenges presented by these inventions to the patent system are mainly legal ones such as subject matter eligibility, sufficiency of disclosure and non-obviousness, aspects that will excite only a patent attorney.

WIPO Technology Trends 2019 – Artificial Intelligence reported about 340,000 AI-related patent applications have been filed to-date. Computer vision is the most popular functional application of AI (49 percent of all AI-related patents), with natural language processing and speech processing claiming second and third place (14 percent and 13 percent of all AI-related patents, respectively). It is said that we are currently experiencing the third AI boom.

If this is the space you play, what is there to look out for in pursuing protection for your AI invention?

There must be more than just the application of a known algorithm to a particular problem. For example , using an existing library to solve a problem in a new way would not be a patentable invention. An AI-related invention must be more than a straightforward application of an algorithm and there must be some form of 'technical effect', thus a technical solution, to a technical problem.

Perhaps the oldest example of an algorithm providing a technical effect can be found in a European Patent Office decision from 1987 which involved an X-ray apparatus having a number of X-ray tubes. The tubes are controlled by an algorithm executed by a computer to achieve optimum exposure combined with adequate protection against overloading of the tubes. The technical effect of this algorithm on the X-ray apparatus is that tubes of the X-ray apparatus last longer. In other words, the algorithm has a useful result in the physical world.

Another example can be found in a US patent granted to Lam Research in 2018, which relates to improvements in the use of plasma for processing substrates (such as wafers or flat panels) to form electronic products. The invention particularly addresses the complexity of tuning plasma reactors during processing to achieve and maintain desired processing performance over time as the plasma reactor experiences physical changes. The solution involves processing machine learning to make adjustments to desired processing state values to produce adjusted desired processing state values based on verification feedback received from selected feedback metrics. The vector can then be transformed into adjustments to settings for tuning knobs of the plasma reactor to shift the current processing to the desired processing state. Here, a technical effect is provided by the computer-implemented algorithm in the form of an improvement to a manufacturing process which results in a reduction in down-time of a plasma reactor.

Common to these two examples is the relevant algorithm having an effect in the physical world. In the case of the X-ray apparatus, tubes last longer. For the plasma reactors, down-time of the plasma reactor is reduced. Other examples of physical world effects include improving production output, reducing manufacturing defects and improving processing time or efficiency in executing the algorithm (which would include modifications to reduce computing resources required to execute an algorithm).

So, innovators in the field of AI looking to take advantage of patents can do so for solutions that:

- involve an interesting or unconventional use of AI to solve a particular problem in technology, and
- have some impact on the physical world that was previously not achievable.

As recorded in the WIPO 2019 report "*AI is increasingly driving important developments in technology and business, from autonomous vehicles to medical diagnosis to advanced manufacturing. As AI moves from the theoretical realm to the global marketplace, its growth is fueled by a profusion of digitised data and rapidly advancing computational processing power, with potentially revolutionary effect: detecting patterns among billions of seemingly unrelated data points, AI can improve weather forecasting, boost crop yields, enhance detection of cancer, predict an epidemic and improve industrial productivity.*"

How can anyone consider a world without AI in it!

A counterfeiter with Gucci Flair!

Ilse du Plessis

Counterfeiters...we all know what they're like! Nasty sorts who knowingly deceive and rip-off consumers, tempting them to buy cheap and often poorly made copies of famous names. Nasty sorts who don't hesitate to sell goods that may well pose health risks. Nasty sorts who deliberately damage property, the property in this case being intellectual property in the form of trademarks. Nasty sorts who deserve everything they get, be it a cripplingly expensive civil court injunction and damages order, or a criminal conviction carrying a custodial sentence.

But what if the counterfeiter isn't your run-of-the mill copycat? What if the counterfeiter makes copies that are even better than the real thing? What if the counterfeiter makes copies that cost even more than the real thing? What if the counterfeiter brings the brand to the attention of people who would otherwise never interact with it? Should the brand owner treat a counterfeiter like that a little differently? As a potential partner maybe?

If you read the *GQ* article *Gucci partnership, dressing Harlem's notorious gangsters and getting busted by Sonia Sotomayor* (or saw the CNN report on the topic) you'll know where this is going. If not, welcome to the weird and wonderful world of Dapper Dan!

Dapper Dan has an interesting past. Back in the day – and in fact in the place, which was Harlem, New York – Dapper Dan was very much the man. Dapper Dan produced counterfeit Gucci, Fendi, Louis Vuitton and MCM merchandise. According to the *GQ* article Dapper Dan produced "acts of sartorial piracy so extravagant that they demanded to be described with the neologism knock-ups rather than knock-offs".

Dapper Dan was something of a visionary and a trend-setter. He is said to have started the "Africanization of the premium European brand", an idea that came to him after conducting a tour of African countries – Ghana, Nigeria, Kenya, Uganda, Ethiopia, Egypt and Tanzania. Dapper Dan, we're told, was known as "the original auteur of gangster chic". As such his counterfeits had useful practical additions such as (stab-resistant) Kevlar elements and hidden double pockets for contraband. Amongst Dapper Dan's clients was "the baddest man on the planet", Mike Tyson. Dapper Dan's counterfeits were more expensive than the real thing, "scarcely affordable for anyone outside the elite circles of sports stars and drug kingpins".

Of course, this didn't go unnoticed. Eventually the lawyers arrived. Dapper Dan was raided by lawyers

acting for various brand owners, presumably similar to the Anton Piller order in South Africa. One of the raiders was Sonia Sotomayor, then a young lawyer who had grown up in the Bronx and who is now a Supreme Court justice. Sotomayor managed to make a very favourable impression on Dapper Dan, notwithstanding the fact that she was raiding his premises and effectively putting him out of business, because, it seems, where the other lawyers present were quite prepared to rip up the rule book, lawyer Sotomayor was adamant that they had to play nice, to abide by the rules.

Quite some time later, in 2018 Gucci unveiled a "balloon sleeved bomber in mink and leather" that was, by all accounts, practically identical to a 1989 Dapper Dan creation that he had sold under a brand name he fancied at the time, Louis Vuitton.

Gucci's product caused a stir in the place where the biggest stirs occur... online! "A knock-off of a knock-up", said the twitterati. What could possibly happen next? Well, it turns out that the online stir got Gucci thinking. And talking. To Dapper Dan no less. How about we work together Dapper Dan? How about we collaborate?

And that is just what's happened, there's a collaboration between the former foes. Dapper Dan will now work on materials supplied by Gucci. According to the article Dapper Dan says he has a *carte blanche*, well certainly, "within the context of what Gucci's all about, you know, their standard... which I raise the bar on (laughs)". Or, as he puts it, "the only limitations will have to do with the perception of what I think is hip and what they (Gucci) think is hip, keeping the essence of Gucci." And his advice to the big brand owners: "*The big houses can keep pulling people in, but they have to first become relevant with the have-nots. It's all about the have-nots.*"

So, am I, a trademark attorney whose business it is to see that companies protect their trademarks and enforce those trademarks against infringers who damage their goodwill and deceive (and sometimes even physically harm) advising consumers to go easy on counterfeiters? Of course, I'm not. ……matters aren't always black and white – always keep an open mind!

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John Foster

John is a partner in Spoor & Fisher. He is a qualified attorney and trademark practitioner, specialising in domestic and foreign trademark prosecution and the enforcement of IP rights, including litigation relating to trademarks, copyright, passing off, unlawful competition and advertising.

"I writhed with joy, which I experienced for the first time, and kept writing with excitement. The day a computer wrote a novel. The computer, placing priority on the pursuit of its own joy, stopped working for humans."

That's how it ends at least. What you may ask? The novella entitled *"The Day a Computer Writes a Novel"* which was written (at least in part) by a Japanese Artificial Intelligence (AI)-program and was entered into the Nikkei Hoshi Shinichi Literary Awards, Japan in 2016. While the novella made it through the first round of judging, it unfortunately did not cut it against the human competition.

Impressive as it is, the novella was written with the input of a human team of researchers from Japan's Future University Hakodate. This team selected various words and sentences and set parameters for construction before letting the AI "write" the novella autonomously. The team leader, Hitoshi Matsubara, had the following to say on the topic of creativity within autonomous artificial intelligence:

> *"So far, AI programs have often been used to solve problems that have answers ... In the future, I'd like to expand AI's potential [so it resembles] human creativity".*

Eligibility of AI created copyright works

Traditionally AI is a branch of computer science, but is that all it is? How do we explicitly define human intelligence? What is it exactly? In the copyright sense, it seems that AI are only capable of assisting with the creation of truly creative works, such as the novella mentioned above, and are not yet truly creative on their own. We expect to see futuristic world of works created by AI without any human intervention. That is what machine learning is all about! But who is the author and owner of such works?

This is a topic of debate by many writers, but there is not yet any universally accepted point of view (nor will there ever be).

At the September 2019 AIPPI World Congress, a viewpoint which is emerging in the international community was expressed with the following resolutive statement:

> *"AI generated works should only be eligible for Copyright if there is human intervention in the creation of the work and provided that the other conditions for protection are met. AI generated works should not be protected by Copyright without human intervention." (emphasis added)*

AIPPI acknowledged in the resolution that *"AI generated works may be eligible for protection other than Copyright protection ... even without human intervention."*

There does therefore appear to be a school of thought that copyright protection should only be conferred on works when there is human intervention, and that copyright protection as we currently know it should not be conferred on works which have been created by AI with no human intervention.

"ARTIFICIAL INTELLIGENCE IS AN ENTITY (OR COLLECTIVE SET OF COOPERATIVE ENTITIES), ABLE TO RECEIVE INPUTS FROM THE ENVIRONMENT, INTERPRET AND LEARN FROM SUCH INPUTS, AND EXHIBIT RELATED AND FLEXIBLE BEHAVIORS AND ACTIONS THAT HELP THE ENTITY ACHIEVE A PARTICULAR GOAL OR OBJECTIVE OVER A PERIOD OF TIME."

Resolution adopted by International Association for the Protection of Intellectual Property ("AIPPI"), World Congress, London on 18 September 2019 on "copyright in artificially generated works"

Specific works – AI creations, the Challenge of authorship

Sound recording

In 2017, Taryn Southern, a singer and online personality in the United States known for her YouTube channel and having been a contestant on *American Idol*, used Amper Music to create a track for a new single entitled *"Break Free"*. To use Amper Music, you select your genre of music and a mood (i.e. pop, workout). It then presents an audio track which you can edit by changing tempo, key, mute individual instruments, etc. Southern used Amper Music to generate the initial track for her single but had to make a lot of creative decisions before producing the final sound recording, including switching instruments, changing the key and writing and performing the vocals. There was, in short, lots of human intervention in the production of the final sound recording. Still, the AI was instrumental in authoring the work.

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There are many AI music programs available other than Amper Music of Amper Music, Inc. For example, the Endel app, for iOS and Android. Endel uses the concept of generative music and pulls data from your smart phone – like the weather, the time of day, your location, and your body's circadian rhythms – which it uses to create music based on your surroundings. Apparently, if you listen to Endel every day you'll never hear the same composition twice. In March 2019, Endel announced that it had been signed by a major label, Warner Music Group, and it has already released a number of albums.

There does therefore appear to be a market for AI-authored sound recordings.

Artistic Work

(Photo Credit: J. Walter Thompson, Amsterdam. Sourced: WIPO, 15 November 2019)

The artistic work depicted above is what has been dubbed *"The Next Rembrandt"* – a "painting" unveiled in Amsterdam, in 2016, which is not the work of the Dutch master Rembrandt at all, but rather the creation of a combination of technologies including facial recognition, AI, and 3D printing.

A deep-learning algorithm was shown all of Rembrandt's 346 known paintings which it analysed before being asked to produce a brand-new painting replicating similar subject matter and the same style. How did the algorithm choose the subject, since it had to be entirely new? Apparently, after analysing Rembrandt's works, the AI concluded that the new piece of art should be a portrait featuring a Caucasian male, facing to the right, with facial hair who is between 30 and 40 years old and is wearing dark clothing with a hat and a collar. The AI then determined specific facial features matching that profile with the aim of creating what would be considered a "typical" Rembrandt-style eye, nose, mouth, and ear.

Once all of this had been decided by the AI, the painting was 3D printed using special paint-based UV ink which replicated the brushstrokes and layers of paint that Rembrandt might have used. There were ultimately 13 layers of ink!

South African Copyright Act and AI works protection

Copyright is the exclusive right of the owner of copyright (being the qualified author or a person having acquired rights from or through the author) of an original work recognised by the Copyright Act, to use, reproduce, copy or deal with a copyrighted work.

The Act grants protection to 9 different types of works, namely:

- literary works;
- musical works;
- artistic works;
- cinematograph films;
- sound recordings;
- broadcasts;
- programme-carrying signals;
- published editions;
- computer programs.

The terms of copyright protection for the different works differ. For literary or musical works or artistic works, other than photographs, the term of protection is the life of the author and 50 years from the end of the year in which the author dies (reference to "life" suggests that the author must be an individual). For cinematograph films, photographs and computer programs, 50 years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright; or is first published, whichever is longer. For sound recordings, 50 years from the end of the year in which the recording is first published.

The author fulfils a crucial position in copyright law, not just because the term of protection is sometimes determined by his or her life, but also because the whole philosophy behind copyright protection is also aimed at the author.

> *"The underlying philosophy or principle of copyright law is to reward or compensate the author of a work for the utilisation or expenditure of his talents, time and effort in creating works of intellectual property. Copyright is intended to provide and establish the incentive for the author to create more and better works. Copyright law serves to look after the interests of the author and to define and regulate the scope and operation of his qualified monopoly in relation to his work."*
>
> *(emphasis added)*
>
> Dr Owen Dean, *"Handbook of South African Copyright Law"*

The author of a work is the person who is responsible for the creation of the material embodiment of the work. This is not necessarily the person who conceived the idea which gave rise to, or which is embodied in, the material work (remember, there is no copyright in ideas *per se*).

There are a number of specific requirements for copyright protection in a work. Including that it must be made by a qualified person, and that it must be original.

With regard to a qualified person, this is an individual who is a citizen of, or is domiciled or resident in, South Africa or a convention country; or a juristic person, a body incorporated under South African law or under the law of a convention country. There is no room in this definition for an AI. The author must be an individual or a juristic person. However, before concluding that this excludes AI works completely, it's necessary to dig a little deeper.

The answer to the question of *"who is the author of a literary, musical or artistic work?"* is in principle a relatively simple one: the author is the maker or the creator of the work. But in the case of the more impersonal types of works (e.g. sound recordings, cinematograph films, computer programs, etc.) in which a number of different people are often involved in different aspects of the creation of the final work, it is more difficult to determine which person(s) is actually responsible for the creation of the final work.

Thankfully, our Copyright Act provides some guidance in this regard and, specifically, in respect of computer-generated works. In terms of section 1(1) of the Copyright Act 98 of 1978, as amended by the Copyright Amendment Act 125 of 1992:

> *'"author' in relation to a literary, dramatic, musical or artistic work or computer program, which is computer-generated, means the person by whom the arrangements necessary for the creation of the work were undertaken."*
>
> *(emphasis added)*

What is clear from our Act, is that special provision exists for computer generated works. Considering that the amendment to insert this definition was made in 1992, our legislators were quite forward thinking. Unfortunately, they did not include a definition of *"computer-generated"*. Our courts have, however, been helpful in clarifying this.

In the matter of *Payen Components South Africa Ltd v Bovic Gaskets CC and Others* 1995 (4) SA 441 (AD) the court provided the following definitions:

> *"computer-aided" a work created using a computer where the computer is a mere tool like a pen or word processor;*
>
> *"computer-generated" a work created by the computer itself with relatively little human input.*

For both of these definitions, human input is still required – although "relatively little". According to the definition in *Payen Components* then it is unclear whether a work with absolutely no human intervention would still qualify. We should, however, bear in mind that in 1995 when this judgment was issued, it was perhaps still too farfetched to believe that a work could ever be completely autonomously generated by a computer with no human input.

Be that as it may, any uncertainty in this regard was cleared up by the judgment in *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA). Here the court had the following to say:

> *"The Act does not contain a definition of 'computer-generated'. In my view, a work qualifies as having been computer-generated only if it was created by a computer in circumstances where there is no human author of the work. If there is a human author, the work is computer-assisted and not computer-generated."*
>
> *(emphasis added)*

It is then clear that "computer-generated" is when there is no human author. In Dr Dean's words:

> *"a computer-generated work is a work … which is made by the operation of a computer in circumstances where it is not possible to attribute the resultant work directly to the efforts of any individual causing the work to be made. Such a work would typically be made by the interaction of a plurality of computer programs. A computer-generated work must be distinguished from a computer assisted work which is a work made by an individual using a computer as a tool or instrument … The author of a literary, dramatic, musical or artistic work, or a computer program which is computer generated is the person by whom the arrangements necessary for the creation of the work were undertaken. The author of a computer assisted work would be determined by application of the normal principles of authorship of a work…"*
>
> *(emphasis added)*

Thus, it would appear that in South Africa works created with the assistance of AI, where there is of course human intervention; and works created by AI where there is *"relatively little"* or no human intervention, are protected. Whether or not such works ultimately qualify for protection would of course still depend on fulfilling the other requirements for protection, including being original.

To determine authorship of these computer-generated works, we must consider who undertook the arrangements necessary for the creation of the work. There are many other types of works where the author is the person who made the arrangements for the making of the work. These include sound recordings and cinematograph films.

In the case of *Nintendo Co Ltd v Golden China TV-Game Centre and Others* 1995 (1) SA 229 (T) – where cinematograph films were created by a team of employees of a company, which team consisted of a team leader, a director, designers, a producer and programmers, as well as by employees of other companies commissioned to make a particular work – the court held that the company was the author because all the work was done for it and it received the final product and the arrangements for the making of each film were made by the company through the agency of its employees and others. The author of a cinematograph film is essentially the person who orchestrates and assumes responsibility for the making of the film.

In a situation where an AI aided the creation of a work, such as in the writing of *"The Day a Computer Writes a Novel"*, the author would be the person(s) who first makes or creates the work, in this case the team of researchers from Japan's Future University Hakodate, including Mr. Matsubara.

In the case of the musical work and sound recording which forms the backtrack to *"Break Free"* – assuming it was indeed track composed, "played" and mixed by an the AI called Amper Music – the author would be the person(s) by whom the arrangements necessary for the creation of the work were undertaken. I would suggest that the author of the initial sound recording would therefore be Amper Music, Inc. (or Southern depending on the facts) insofar as it made the arrangements necessary for the creation of the work. It would then also be the initial owner and could assign / license the copyright in the works to Southern in terms of a user agreement.

Considering the purpose of copyright protection, namely to compensate the author of a work for his or her talents, time and effort expended in creating the work, if the developer or user of the AI were not the author then there would be little financial incentive to develop an AI program capable of independently creating works if the developer or user, presumably paying a license fee to the developer, cannot benefit financially from the AI-created work.

From another perspective, if an AI, in creating a new work, infringes the copyright of an existing work, who can be sued? Can an AI be held liable?* Section 23(1) of the Copyright Act states that copyright shall be infringed by any person, not being the owner of the copyright, who, without the license of such owner, does or causes any other person to do, in South Africa, any act which the owner has the exclusive rights to do or to authorize (i.e. reproduce, adapt or commercially exploit). It should be the person who orchestrates and assumes responsibility (makes the arrangements) for the making of the infringing work, i.e. the author of the infringing work, that should be held liable.

**The AIPPI resolution does not address copyright infringements by AI-generated works. In my view, the questions of authorship and infringement should not be separated insofar as they are, to an extent, inter-related.*

https://za.pinterest.com/pin/204562008060261035

Weeding out the old!

By
Ferosa-Fae Hassan &
Manisha Bugwandeen-Doorasamy

An influx in the sale of cannabis products in South Africa has caused much confusion among consumers. Cannabis beverages, oils, soaps, creams and even foods infused with cannabidiol (CBD) oils. There have been numerous exhibitions and festivals across the country demonstrating the health benefits.

As the Constitutional Court (CC) in the judgment of *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30, held that certain provisions of the Drugs and Drug Trafficking Act and the Medicines and Related Substances Act are unconstitutional based on one's right to privacy. As such the use, possession or cultivation of cannabis in private for personal consumption was decriminalised in South Africa. As only the **private use** of cannabis is permitted, why are cannabis products available for sale in our local stores?

While it is marijuana that is commonly associated with the word cannabis, there are variants and derivatives of cannabis. These variants and derivatives contain different levels of tetrahydrocannabinol (THC), the component in cannabis responsible for that cloud nine feeling. While the sale of THC and marijuana products remains illegal in South Africa, products containing CBD and hemp (which contains low levels of THC) are legally available for sale. Preparations containing CBD must comply with the standards published by the Minister of Health as Regulation 756 in Government Gazette no. 42477 on 23 May 2019, namely:

- it must contain a maximum daily dose of 20mg CBD with an accepted low risk claim or health claim which only refers to general health enhancement without any reference to specific diseases; health maintenance; or relief of minor symptoms (not related to a disease or disorder)

- alternatively, it must consist of processed products made from cannabis raw plant material and processed products where only the naturally occurring quantity of cannabinoids found in the source material are contained in the product and which contain no more than 0,001% of THC and no more than 0.0075% total CBD.

The "cannabis products" available in stores contain CBD or hemp and should comply with the regulations. Due to the low levels of THC in these products, they are unlikely to affect your mental health.

From a trademark perspective, previously applications containing any reference to cannabis were deemed contrary to law, public policy or morals and did not qualify for registration. In light of the Constitutional Court judgment, this position has changed.

In August 2019, the South African Trademarks Office published updated *Guidelines On The Examination of Trademark Applications*. Cannabis-related trademark applications are now accepted on condition that the Applicant undertakes that the products comply with the standards set by the Minister of Health. Non-compliance would render the sale of the product and its associated trademark application(s) contrary to law.

Whilst the sale of cannabis itself (whether recreational or medicinal) has been legalised in jurisdictions such as Canada, South Africa has a long way to go. As public policy in South Africa continues to evolve, given the huge market potential associated with the cannabis industry, it is anticipated that in the near future more legislation and guidelines will be passed, weeding out the old laws. This will ensure adherence to legal standards and the general regulation of the cannabis industry. It is certain that this newly tapped CBD and hemp market in South Africa will result in more cannabis-related trademark applications being filed. If this market is of interest to you, safeguard your rights and protect your trademarks!

Manisha is an executive and Ferosa-Fae an associate, both in ENSafrica's intellectual department and they specialise in local and foreign trade mark matters.

IT IS NOW THAT MATTERS

Daniel is a Private Equity and Venture Capital entrepreneur and holds a B.Eng. (Industrial Engineering) and MBA from the University of Stellenbosch. He is a director of Stocks & Strauss.

Why now? Why not 20 years ago you might ask. I am sure that you have heard about a certain species of bamboo. If you plant a seed today, you will not see anything above the ground during the first year or during the second, maybe even the third year. But one morning the bamboo will start growing at speeds of up to 91 cm per day according to the Guinness book of world records. Reaching a height of up to 30 meters in a matter of weeks. How is this possible? While the other plants are growing above the ground and showing off, the bamboo is patiently growing and spreading its roots. This root system will be the driving force that feeds the growth when it finally starts showing above the ground.

This is how I see the South African IP landscape. We have some of the top brains and skills in the world that have been working on some of the most innovative and novel ideas for years and years, but one ingredient was missing. Before we get to that ingredient, I want to tell you a little story about one of our investments that we made during early 2016.

In 2016 the music industry was in an extremely difficult position with physical (CDs) sales declining rapidly while downloads (iTunes) and streaming (Apple Music, Spotify etc.) were still too small to even remotely compensate for the revenues lost due to physical sales falling off a cliff. At that time, the jury was still out on whether downloads or streaming would dominate as the future of music sales.

But everyone agreed with one fact: the music industry was in deep, deep trouble.

Wasteland or opportunity? We invested in a brand-new record label. It seemed crazy at the time. In 2017 PWC forecasted that streaming revenue would grow at a rate of 34.5% per year. Close but no Cigar. According to PWC 2018 report, streaming revenue grew by 76.3% in 2017 and it just keeps growing. On 24 April 2018 Reuters announced that online streaming became the music industry's largest revenue source, overtaking physical sales and digital downloads for the first time in history.

Just as the bamboo was able to shoot up above the ground in a matter of days due to the strong root system that formed the foundation during years of growing under the soil, the South African music industry was creating high-quality content for many years that instantly became accessible once streaming enabled the effortless consumption of hits from legends like Brenda Fassie, Ladysmith Black Mambazo, Jo Black and David Kramer.

Evidently international record labels have changed their strategy and approach to finding new artists. First, there were demo tapes, then there was a move towards strategic market positioning and today these labels are putting an increasing focus on data analytics of streaming platforms. Data from streaming platforms are monitored and informs the process and selection criteria for determining whether a new artist will be signed up to an international record label.

Gone are the days of listening to demo tapes for hours or even days to find a new artist.

In the 1980s a group of brilliant brains from Oxford University developed the lithium-ion battery, the intellectual property that forms the basis of most electric cars. This was soon acquired by Japanese corporation, SONY.

This event was one of corner stones for the establishment of Oxford University Innovation since they realised` that it is possible for Universities to benefit financially from innovative research. From 2010 to 2019, over £2.1bn in external investment has been raised by Oxford University Innovation spinouts, and eleven were listed in London and New York.

How are Bamboo shoots, the music industry and lithium-ion batteries relevant to the South African intellectual property landscape?

South Africans host some of the most innovative minds in national universities.

Source: http://www.hcsmsa.co.za/africanart4change/

Just like the bamboo growing a strong root system under the soil, the South African industry offers masterminds creating world-class innovations under the radar. A strong foundation. All we need is a catalyst that will allow these innovations to shoot up. What is this catalyst? A balanced combination of risk capital and the accompanying commercialisation mindset to be.

This will attract the SONY's and the international music label investors needed to see an industry and asset class rising. Just like that bamboo.

From the Juta Law Reports

The following judgments were reported since August 2019

Patent — Validity — Application for revocation of patent — Invention obvious to person skilled in art and thus not involving an inventive step in terms of ss 25(1) and (10) of the Patents Act 57 of 1978. Sandvik Intellectual Property AB v Outokumpu Oyj Case No: 879/2018 18-09-2019 SCA Navsa JA, Tshiqi JA, Swain JA, Molemela JA and Plasket JA Serial No: 1749/2019

Patent — Infringement proceedings — Patents Act 57 of 1978 chapters X and VI, respectively, creating two-track proceedings in patents disputes: (i) revocation (ch X) and (ii) infringement (ch VI) — Whether findings in revocation proceedings having final, binding effect on later infringement action — Whether alleged infringer who fails to make case for revocation raise further invalidity defenses when later sued for infringement — Res judicata — Issue estoppel — Bifurcated proceedings — Split decision — Judgment of High Court standing. Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation Case No: CCT 212/18 24-10-2019 CC Mogoeng CJ and Cameron J, Froneman J, Jafta J and Khampepe J and Ledwaba AJ, Madlanga J and Mhlantla J and Nicholls AJ and Theron J Serial No: 2066/2019

Trademark – Expungement – Infringement – South African Trademarks Act No. 194 of 1993 – Section 24 read with section 10(2)(a), 10(2)(b), and (10)(2)(c); section 27(1)(a), 27(1)(b); section 10(13). Separate Infringement proceedings, counterclaim for expungement; separate application for expungement. Infringement withdrawn. Proceedings of Expungement continued. Cancellation of various trademarks. Stable Brands (Pty) Ltd v LA Group (Pty) Ltd and Another (33268/18) [2019] ZAGPPHC 568 (29 November 2019)

Trademark – Expungement – Infringement – South African Trademarks Act No. 194 of 1993 – Sections 9 and 10(1) and (2). Application for interdictory relief in respect of a registered trade mark and a counterapplication for the expungement trade mark and for the endorsement of the registered logo of the trade mark with a disclaimer. Applicant failed to prove that the ordinary descriptive meaning of its mark has evolved, through use, into a unique and distinguishable mark and with specific distinctiveness to its services. The application for infringement dismissed marks cancelled. CHRISTOPHER JOHN, BADENHORST and RAPID SPILL RESPONSE CC vs SPILL TECH (PTY) LTD; counter-application SPILL TECH (PTY) LTD vs CHRISTOPHER JOHN BADENHORST, RAPID SPILL RESPONSE CC and THE REGISTRAR OF TRADE MARKS (38556/18) [2019] (5 December 2019)

Competition — Restraint of trade — Enforcement — Applicant, the previous employer of third and third respondents, seeking order interdicting them from continuing with their employment with fourth respondent, on grounds of breach of restraint of trade — Applicant, a public company conducting business of importer and distributer of fast-moving consumer goods; fourth respondent conducting business as fast-moving consumer goods global procurement service provider — Allegation that respondent ex-employees breaching restraint of trade agreements in that they have access to, or possess, confidential information belonging to applicant, and have attempted and/or succeeded in soliciting applicant's suppliers/customers to detriment of applicant — Applicant establishing that it had interests deserving of protection at termination of agreement, and that such interests were being prejudiced — Applicant establishing reasonableness of restraint — Application granted. Monteagle Consumer Group Limited v Balcomb Case No: 3302/19P 03-10-2019 KZP Seegobin J Serial No: 2053/2019