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IN THIS ISSUE

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FROM THE EDITOR

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Artificial intelligence (AI) and Machine Learning (ML) touched just about every field in 2023 and is leading the technology revolution in the IP space. This is evident from the Technology Trends report issued by WIPO. The report provides evidence-based projections and trends on the future of AI and includes analytical data of patent applications and scientific publications to better understand the latest trends in the field making it of particular interest to business leaders, researchers and policymakers. The report reveals the top players in AI from industry and academia, and the geographical distribution of AI-related patent protection and scientific publications. The report includes commentary and industry perspectives from more than 20 of the world's leading experts in AI. In this edition we include an overview of the AI space over the past 10 years.

As patent attorneys we know how challenging it is to invalidate a patent on the grounds of lack of enablement or obviousness, it is thus with interest that we note the trends in 2023 in the United States Supreme Court. In 2023's Amgen v. Sanofi case, the United States Supreme Court determined that several of Amgen's patent claims to a class of antibodies were invalid for lack of enablement; In 2023 Cellect LLC , the Federal Circuit affirmed the PTAB's cancellation of claims for obviousness and double patenting over reference claims from expired patents in the same family in which differences in expiration dates were due solely to patent term adjustment. Should the trend continue, and followed by other countries it will have quite a significant impact on the patent protection for pharma and other life sciences patents.

From the European desk, the Unitary Patent Court opened its doors on 1 June 2023 according to a Lexology updated posted in January 2024, the UPC confirmed that on 21 December 2023 there were 160 cases before it, including 67 infringement actions and 24 revocation actions, as well as 48 counterclaims for revocation (albeit in 18 infringement actions). It is expected to see the numbers rise and it would be interested to monitor how the UPC develops their decision making, we include an article in this edition on the first decision, an order of the Local Division Munich of December 20, 2023. Patent holders and business and will need to consider their strategic options when litigating in Europe.

"The test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function." F. Scott Fitzgerald

Navigating Technology Licensing for International Manufacturing Businesses

By Sonja London

SONJA LONDON

Sonja London is General Counsel and Licensing Executive in TactoTek, world-leading innovator in the field of smart surfaces and structural electronics. Sonja has global responsibility of TactoTek's IP, licensing and standardization strategies as well as overall legal and compliance matters. Before joining TactoTek, she worked with Nokia Patent Business for 14 years in various roles, in her latest position leading Nokia's Consumer Electronics licensing globally. Sonja has been deeply involved in licensing of various technologies for automotive, consumer electronics, mobile devices and infrastructure products. Her experience includes patent pools, joint licensing, patent transactions as well as digitalizing and managing licensing business.

In addition, Sonja is involved in technology and growth companies as board member, investor and advisor. She is President-elect and Board Member of Licensing Executives Society International. Sonja holds a Master of Laws from University of Helsinki and Executive MBA from Aalto University. She is ranked in IAM Strategy 300 as one of the world top IP Strategists.

In the rapidly evolving landscape of contemporary manufacturing, keeping pace with competitors demands commitment to innovation. As companies strive to incorporate cutting-edge technologies into their manufacturing operations, accessing the new innovation may become complicated. While traditional procurement methods involve obtaining parts from the supply chain, technology licensing emerges as alternative way of acquiring innovative solutions. In this article, we dive into the unique advantages of technology licensing and why it plays a growing role in the manufacturing industry.

Going beyond Traditional Procurement with Technology Licensing

In the conventional manufacturing industry, companies primarily rely on their supply chain for materials and components. Traditional way of purchasing is well known operation and agreement concepts are familiar to lawyers and business leaders. It is relatively easy to understand the warranties and liabilities given by a part supplier. However, this conventional and transactional approach does not work when manufacturers are willing to integrate transformative technologies into their business. Unlike the straightforward acquisition of physical goods, adopting technology requires a deeper level of collaboration and comprehension of the underlying intellectual property and the technology assets in question.

Unlocking Business Potential through Technology Licensing

Technology licensing enables businesses to get access to various strategic benefits. Here are a few key elements to consider.

Access to Specialized Expertise and Know-How. Technology licensing is more than that purchasing of products. Licensed technology assets often include specialized expertise and knowledge (know-how) developed by technology vendors over a long time. Through licensing agreements, licensee companies gain ongoing support, training, and updates to technology which ensure comprehensive understanding and optimal utilization of the technology they adopt. This collaborative relationship goes beyond traditional purchasing, and ofter requires mutual investment in the successful implementation of the technology.

Flexibility and Customization. In contrast to traditional procurement's standardized components, technology licensing offers potentially a higher degree of customization of products. Often technology assets can be applied to improve current manufacturing technologies and enable making of completely new applications, creating new business opportunities and revenue streams.

Risk Mitigation. Innovation is inherently risky, involving uncertainties like technology maturity and market shifts. Innovators face the dual challenge of potential market loss to alternative technologies and the risk of developing technology suitable for business applications. Licensing technology from innovators mitigates both technology and market risk that manufacturer would have if they developed technologies themselves. Further, by leveraging the innovator's technology and their expertise during implementation, licensees can significantly reduce disruptions and setbacks. This kind of strategic collaboration effectively mitigates risk, providing benefit for technology licensees.

Cost-Effective Innovation. No-one can innovate on behalf of the whole world, often not for even a specific industry. Developing new technology in-house demands substantial investments. Therefore the innovator would have paid for costly development, which would be compensated by licensee only after the technology was mature enough to be licensed. This decreases also manufacturer's investment risk. Thus, technology licensing offers a cost-effective alternative, allowing companies to leverage existing innovations, without investing time and resources for long-term development.

Accelerated Time-to-Market. In the fast-paced business landscape, time is a critical factor. Technology licensing enables manufacturing companies to bypass lengthy development cycles they would need in-house and swiftly integrate technologies already tested and proven. This approach provides a competitive edge, allowing for the rapid delivery of new products.

Focus on Core Competencies. Manufacturers excel in producing goods, not necessarily in developing every component or process. Technology licensing allows companies to focus on their core competencies while outsourcing the development of specialized technologies to those with expertise in those areas. This strategic division of labor enhances overall efficiency, with each party contributing its expertise to the partnership.

Market Differentiation. In an era where OEMs wish to provide for consumers' demand of constant innovation, companies embracing new technologies will stand out in the market. Technology licensing enables manufacturers to differentiate themselves by incorporating cutting-edge solutions that align with evolving consumer preferences. This differentiation not only attracts customers but also positions the company as an industry leader.

Scalability and Global Reach. Technology licensing facilitates scalability of innovation without the need to scale up internal research and development capabilities. Manufacturers can tap into a global pool of technological advancements without geographical constraints. This access to a broader range of innovations enables companies to expand their operations and remain competitive in their respective industries.

How to Navigate the Technology Licensing Landscape

While the benefits of technology licensing in manufacturing are self-evident, legal and business professionals must navigate the landscape with diligence and foresight. Thorough due diligence is crucial before entering any technology licensing agreement. Licensee's business teams should assess the innovator's technology solutions and their own business case for the technology. Licensee needs to understand which technology assets are needed and what kind of business benefit they provide for. Analysis should be done on the portfolio of intellectual property rights holistically, not only understanding the patents but also the know-how, software and other technology elements. Developing general understanding of the technology landscape would be useful homework for both parties. Finally, licensed technology should be enabler for company's strategic objectives. Understanding the potential risks and rewards is essential for making informed decisions.

It's essential for legal and business professionals to recognize that, as explained above, licensor has made significant investments into technology development. Technology mature enough to be licensable has over time incurred substantial investments in development, productization, testing, expert personnel, and intellectual property creation. Consequently, licensed technology always comes with a price tag. Licensee should understand that accessing technology which enables significant advancements or new business does not come for free. Payment for access to technology should be viewed as investment, not as cost.

Licensing arrangements often include various intellectual property rights, including patents, copyrights, trademarks, databased and trade secrets. Both legal and business professionals need to be aware of the specific rights granted under the agreement and any restrictions imposed. As technology assets may vary, it is important to understand that intellectual property protection and license grants works in different ways for different assets. Understanding these distinctions is crucial for legal compliance and successful integration of technology into business operation.

The success of a technology licensing agreement depends on whether a win-win agreement with clarity of terms have been achieved. Legal and IP professionals should negotiate a comprehensive agreement that should address concerns of both parties. Licensor typically needs to maintain control and transparency of the usage of its valuable technology assets and ensure compliance in licensee fee and royalty payments. Licensee typically wants to ensure business continuity and manage the relevant business risks. It goes without saying that well-defined agreement minimizes the risk of misunderstandings and disputes going forward.

Effective communication between the technology licensor and the adopting company as licensee is vital for the success of a technology licensing arrangement. Regular updates, collaborative problem-solving, and a shared vision for the technology's evolution contribute to a positive and productive relationship.

Given the complexity of licensing arrangements and expertise required to handle intellectual property questions, both licensors and licensees are strongly advised to engage with expert intellectual property professionals. Whether in-house or external consultants, they bring a depth of knowledge and experience to the negotiation table and help each party to do their homework before negotiations and finally successfully close the licensing deal. They can guide the parties through the complexities of intellectual property law and strategy, ensuring that the final agreement is not only legally sound but also aligns with the strategic goals of both parties.

In conclusion, technology licensing stands as a dynamic and strategic alternative to traditional procurement methods, offering manufacturers access to innovation that goes beyond merely acquiring physical components. By embracing technology licensing, companies can tap into specialized expertise, achieve flexibility and customization, and mitigate technology and market risks associated with innovation. Further strategic advantages include accelerated time-to-market, enabling focus on core competencies, market differentiation, and the scalability required to address global markets. Successful technology licensing arrangement can be key strategic enabler for successful and sustainable innovation in manufacturing.

COMPETITION AND IP LAW – DON'T ASK – ITS COMPLICATED!

By Alexis Apostolidis

Twenty plus years ago IP rights could be robustly enforced and oftentimes the mere ownership of valuable IP rights provided a greater bargaining power over those who sought to access said rights.

Fast forward to the present day and an IP practitioner will advise that the exercise of IP rights is subject to several areas of law that impact upon an owner's IP rights. As the years have passed, constitutional law has developed such that the ownership of property, in this case IP, is not inviolate and that a careful balancing exercise must be undertaken between the right to property and the rights enshrined in the Constitution and other statutes – in some cases the latter rights may well trump the IP rights. Competition law is one such example of where a careful balancing act must be engaged.

Starting with the banal, IP legislation is concerned with providing exclusivity to a person over their creations, inventions, designs, works and the like. In some cases, there is a "quid pro quo". Exclusivity is granted for the disclosure of an invention or design to the public such that the subject matter of the invention or design may be improved upon, for the betterment of mankind. Without this disclosure, progress in the field to which the patents or designs relate will be stilted or substantially delayed.

In the majority of cases, IP is, however, created for the purposes of commercialisation rather than for pure altruistic reasons. The IP legislation, while regulating certain formalities relating to commercial aspects of the exploitation of IP (such as ownership, assignments of rights, recordal of licenses and what a licensee may or may not do) does not address the broader dimension of economic aspects associated with the exercise of IP rights.

The void left by the absence of the broader dimension is filled, inter alia, by the Competition Act 89 of 1998 (the Competition Act).

The purpose of the Competition Act is far loftier than that of the IP legislation. (So lofty that often competition law is abused by disgruntled licensees and customers to get their way concerning an IP right and its exercise).

Purposes such as providing all South Africans with an equal opportunity to participate fairly in the national economy is the broadest purpose set out in the Competition Act. It immediately raises the question as to whether exclusive license agreements to IP, for example, hamper the opportunity to participate in the national economy on an equal footing.

Another purpose of the Competition Act is to provide markets in which consumers have access to, and can freely select, the quality and variety of goods or services they desire. This triggers the question as to whether an exclusive IP right (for which there are no substitutable products / services) limits the desired ability to freely select a good or service and/or whether it prevents the provision of competitive prices and product choices to the consumer. (The other purposes of the Competition Act can be found in the introduction to the statute and to Section 2 of the Competition Act. What is clear from all these purposes, however, is that the focus is different to the IP legislation, in certain instances.)

It is therefore not a far stretch of the imagination to conjure a situation in which there is a conflicting purpose between the exercise of an IP right and the purposes of the Competition Act. This tension, carried through to its logical conclusion, more often than not ends up in a constitutional law debate concerning whether the IP right's holder is being dispossessed of his or her right to property or that the full and inviolate enjoyment of that IP right is being curtailed. In such cases, a balancing of rights, as outlined in the Constitution of South Africa and case law must be undertaken.

At this juncture it is important to note that some IP legislation regulates certain commercial conduct which may well overlap with one or more of the provisions of the Competition Act regulating the same or similar conduct. For example, the Patents Act 57 of 1978 (Patents Act) and the Designs Act 195 of 1993 all address the situation in which there is an abuse of a patent or registered design. The Competition Act includes abuse of dominance provisions which extend to the exercise of patent a registered design rights.

It is only the Patents Act, however, that makes it co-existence with the Competition Act more difficult than in other IP legislation.

This is because Section 18(1) of the Patents Act states:

"Save as is otherwise provided in this Act, no tribunal other than the Commissioner shall have jurisdiction in the first instance to hear and decide any proceedings, other than criminal proceedings, relating to any matter under this Act."

The abuse of a patent in the circumstances set out in Section 56 of the Patents Act, entitled "Compulsory licenses in the case of abuse of patent rights" raises the question as to whether the Court of the Commissioner of Patents has sole jurisdiction over the abuses set out in Section 56, or whether there is con-current jurisdiction with the Competition Tribunal (and the Competition Appeal Court). If it is the latter, how then should a matter in one forum proceed in the other forum in order to avoid conflicting decisions on the same facts?

Putting jurisdictional overlaps aside, the marriage between competition law and IP law is complex.

For example, an IP joint venture between two parties to jointly produce and bring a new technology to the market seems to be straightforward. However, digging a bit deeper, there are a few pitfalls. For example, it is anti-competitive for competitors (or potential competitors) to share sensitive commercial information as this may lead to collusion. Hence, in the context of a joint venture (JV), one party bringing the IP to the table and the other bringing the funding, should avoid the exchange of information relating to the business of each (save if it is non-aggregated data over 6 months or older, depending on the nature of the data and the relevant market(s)) even if the point of the JV is to jointly commercialise the IP. If it is necessary to share certain sensitive information, then each party should have a clean team which is prohibited from disclosing the information to the JV partners. Another issue arises from a competition law point of view, namely of one or both parties are transferring their business to the joint venture, then the joint venture formation may well constitute a merger or acquisition, which required notification to the Competition Commission.

Similarly, the sale of IP (including the assignment thereof) to another party may trigger the merger filing provisions in the Competition Act, to the extent that the sale of IP has, as a consequence, the direct or indirect "disposal" of the IP owner's business (or part thereof). However, even in a traditional merger and acquisition, where the business have IP which they use, then the use of that IP may be curtailed.

For example, in the case of **Nestlé SA v Infant Nutrition Business of Pfizer ([2013] ZACT 16 (18 March 2013))** the Competition Commission raised a concern that in the market for infant

milk formula (IMF) a situation of a 3 to 2 merger would result, leaving the merged parties with a highly concentrated market share of over 70%. After some debate, it was agreed between the Competition Commission and the merging parties that they would enter into a "transitional re-branding" remedy. The remedy entailed the exclusive licensing of the trademarks to a third party purchaser, who would also purchase the assets relevant to the IMF business. This would be for a specific time (10 years). Nestlé also had to provide the third party with product formulations, know-how and process information. After the expiry of the first period, Nestlé undertook not to use the trademarks for a specific time (another 10 years) in order to allow the third party an opportunity to rebrand its products and continue in the market. Only after the expiry of the second 10-year period could Nestle use its trademarks for IMF products. Essentially therefore the remedy created a third-party competitor so that ultimately there would be a 3 to 3 merger following the merger between the parties.

In the case of **Nampak Products Limited and Burcap Plastics (Pty) Ltd (1/LM/Oct06) [2007] ZACT 42 (25 June 2007)**, the acquisition of the remaining 50% shareholding in Burcap Plastics, by Nampak, was considered by the Tribunal. While there were no concerns regarding the consumer market for plastic containers, a concern was raised regarding the industrial market for containers, because metal containers (for paint, for example) were slowly being replaced with new plastics used for plastic containers. Nampak, manufacturing metal containers, was feared to use Burcap as a protective element for the metal containers by increasing the price of plastic containers thereby preventing arbitrage on the price of containers for the industrial sector. The acquisition was approved subject to Nampak agreeing not to enter into any exclusive license agreements (for 3-years) with any licensor for the manufacture of plastic containers for the industrial sector. The purpose of the condition was to help in lowering barriers to entry in respect of new plastic technology for industrial containers.

It is not all bad news, however. In the merger case between Pioneer Hi-Bred International Inc. and Pannar Seed (PTY) Ltd **(Pioneer Hi-bred International Inc and Another v Competition Commission and Another (113/CAC/NOV11) [2012] ZACAC 3 (28 May 2012))** the Competition Appeal Court allowed the merger of the two parties, Swain AJA stating:

"In my view, in the absence of the proposed merger, the decline of Pannar as a competitive force in the market will continue, resulting in its eventual demise, together with the loss of a valuable local resource, being its pool of local germplasm. In addition, the merger will result in an increase in competition, for the market leader Monsanto, in the form of the merged entity, combining Pioneer and Pannar. Such competition, in the South African maize seed breeding market, ***dominated as it is by innovation***

competition, will result in long-term dynamic efficiency improvements, in the nature and quality of seed produced, as well as its competitive pricing, to the benefit of maize farmers and maize consumers in South Africa." (emphasis added in bold).

The merger however came with conditions, one of which was that the parties to the merger had to undertake to negotiate in good faith to make available and licence the plant materials in the Genetic Material List, of which it has a right to license, to public Institutions in South Africa on a non-exclusive and perpetual basis, subject to such terms as agreed upon by the parties and the terms and conditions stated herein. The license was also to allow the right to sub-licence and/or commercialise any inbreds so developed solely for use in South Africa that may be a consequence or outcome of the Public Institutions' breeding activity under the license.

So much for IP and merger / acquisitions.

Turning to more vanilla transactions, the specific prohibitions contemplated by the Competition Act as it pertains to competitors, parties in a vertical relationship and dominant parties, often-times requires some fancy foot work to avoid the outright prohibitions in the Competition Act, especially when an anomalous situation arises.

For example, say that Fritz Engineering is the manufacturer and seller of certain air-traffic control equipment. Fritz has multiple patents to this equipment and airports are constrained to use the equipment because there is nothing else on the market. Say now, that CrashBang Technologies is a potential competitor to Fritz. It supplies airports with the rest of the necessary air-traffic control equipment and has the capability to produce Fritz's equipment at half the price. CrashBang alleges that it cannot enter the market for that specific equipment because Fritz has issued a letter of demand to it for patent infringement. CrashBang further alleges that Fritz has created a patent thicket, and the majority of the patents are invalid.

Fritz and CrashBang, after exchanging some incendiary letters, sit down together and work out a deal whereby CrashBang will be exclusively licensed under the patents and can manufacture the equipment and sell it, but only to state owned airports. It cannot sell the equipment to privately owned airports. In return, CrashBang undertakes to drop any legal action it was going to take, including applying for the revocation of the patents.

An analysis of the arrangement between the two competitors clearly favours the state-owned airports in that there will now be two companies that they can choose from and price

competition will ensue. Stated-owned airports are by far more lucrative than privately airports and CrashBang is happy with the outcome.

Under the restricted horizontal practices part of the Competition Act, the parties may well have engaged in market division, which is outrightly prohibited and for which no pro-efficiency / technological gains can be considered to mitigate the anti-competitive effect. There is no case law that addresses this issue in the specific context exemplified. The only way around the conundrum, in my submission, is to consider the entire agreement, and the circumstances in which it is made, and conclude that the parties are not colluding together in order to reduce consumer choice and/or influence prices and/or the market. Accordingly, notwithstanding that market division is an element of the agreement, it is not its main purpose, and the agreement should fall to be considered on whether it has anti-competitive effects and whether these are outweighed by beneficial effects. (It would be substantially "iffier" in the case where the parties were to agree that the equipment is to be sold at a specific price).

Another conundrum arises in the context of minimum resale price maintenance. This is where a party requires the other party (supplier / distributor / downstream party) to sell a product or provide services at a price below which the product or service cannot be sold. In the pharmaceutical sector, registered medicines are sold at a Single Exit Price (SEP), in terms of legislation. Hence, if the price of a medicine is R550 per pack, that is its SEP. No more, no less. Do you see the conundrum? It lies with the "no less", since, technically, the SEP becomes a minimum price below which the medicine cannot be sold. Again, I believe a common-sense approach must be adopted. The purpose of the agreement is not to set a minimum resale price. The minimum resale price is simply as a consequence of legislation. (Of course, if your client is feeling particularly jittery about this, one could apply for an exemption under the Competition Act, which application is not without its own little conundrums).

Finally, there is the abuse of dominance provisions in the Competition Act. These could be the subject of an entire book, so I restrict myself to some general comments and an example (based on a real life matter, with names changed as well as the respective products).

The mere fact that a person has an IPR does not mean that that person (human or legal, and, maybe one day, AI) is dominant in a particular market. It is only if there are no other substitutable products where this may become a problem or the IPR holder can operate in the market independently of its competitors.

The mere fact that a dominant IPR holder refuses to license a product or service or terminates a license does not mean that the IPR holder is perpetrating an abuse of dominance. First, the product or service must be scarce. If that is not the case, it must relate to the refusal to license something that is essential (a resource / infrastructure that cannot be reasonably duplicated). Finally, if the latter is also not the case, then the refusal must result in exclusionary conduct causing foreclosure or preventing participation or expansion in the relevant market. A good example is:

Heart Attack Chicken (PTY) Ltd is a famous brand that sells delicious fried chicken using a special flavoured oil to fry it. The chicken is a "fast food" and is appropriately priced. Nirvana Chicken (PTY) Ltd is also a famous brand. It sells chicken that is grilled, no oil is used, and its sauces are free of msg, food dyes and the like. The chickens used are free range and for every chicken meal, a lucerne grass smoothie is provided to aid digestion. Nirvana Chicken is a sit-down restaurant in the traditional sense. Both are franchised. Both own trademarks and have a brand identity.

Heart Attack Chicken is present in a number of malls, as is Nirvana Chicken. The former however becomes aware that Nirvana Chicken is teaming up with Cow Burgers Family Restaurants (PTY) LTD in some of the malls, including one next to the mall that only has Heart Attack Chicken. Heart Attack Chicken approaches Nirvana Chicken with a business plan saying that it would like a license to sell chicken under the Nirvana Chicken brand so that it may offer a dual offering, much like what Cow Burgers are doing. Nirvana Chicken says "no". Heart Attack Chicken lays…….. a complaint to the Competition Commission saying that the refusal to license it constitutes an exclusionary act and it will lose business and thus the refusal is anti-competitive. Foot traffic in the mall will be diverted to the Cow Burger / Nirvana Chicken restaurant, so Heart Attack Chicken argues and this will negatively impact on shop owners.

Sadly, this is not an abuse of dominance. Nirvana Chicken is entitled to conduct its business as it wishes in this factual matrix and is a different type of restaurant – sit-down verse fast foods. Cow Burgers is also a sit-down restaurant.

While Heart Attack Chicken may lose customers, it is unlikely that it is going to be foreclosed or that it cannot compete in the broader market for chicken meals or even expand. While the foot traffic may diminish in the mall in which Heart Attack Chicken is located, it is unlikely that the shops will foreclose or be unable to compete and even if this were to be the case, if

there were other malls in a reasonable radius, consumers would not be ill affected, at least not to the extent contemplated under competition law. Such a complaint would unlikely see its way to the Competition Tribunal. (**Note:** No animals were harmed during the conjuring of this example).

This last example brings me to being very dangerously over the word limit for this article and therefore I will sign off, with a warning. Always consider whether there is a competition law dimension before you advise on the exercise of an IPR, whether it be enforcement or commercialisation and be alive to the risk that a disgruntled third party may file a complaint (which costs nothing) which, at best, may make life difficult, and at worst, be referred to the Competition Tribunal resulting in administrative penalties and the like.

About the Author

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Alexis is a patent attorney at Adams & Adams and heads the Competition Law Group. Alexis specialises in the interface between intellectual property and competition law and is currently advising on a matter concerning an alleged abuse of patents in the Court of the Commissioner of Patents and the Competition Commission.

Tilman Müller-Stoy

Julia Bernatska

File wrapper estoppel at the UPC

Eight months have passed since the start of the Unified Patent Court (UPC), and more than 200 cases are now pending there. The UPC has already decided on many procedural and substantial legal issues and continues to establish its own, autonomous case law. Yet, many questions have not yet been (fully) clarified. A particularly important one is the issue of claim construction in relation to the file wrapper estoppel doctrine. Now, there is a first decision on this issue, namely an order of the Local Division Munich of December 20, 2023[1].

By way of background: according to Art. 69 EPC, the scope of patent protection shall be determined by the claims (primacy of the claim). The description and drawings shall be used for claim interpretation. However, there is no explicit law as to whether and how statements made by the applicant or the examiner during prosecution or opposition proceedings can or must be considered for claim construction. This also applies with regard to the UPC. Neither the Agreement on a Unified Patent Court (UPCA) nor the Rules of Procedure provide guidance in this regard. National case law of the member states of the UPCA which is a source law for the UPC pursuant to Art. 24 (1)(e) UPCA is rather disparate. Some acknowledge the file wrapper estoppel doctrine, e.g., the Netherlands, Belgium and Sweden, and others, like Germany, France and Italy, do not.

[1] Order of the Local Division Munich of December 20, 2023, UPC_CFI_292/2023.

In Austria, statements made during prosecution or opposition proceedings have to be considered only in declaratory judgment proceedings.[2]

With the order of December 20, 2023, the Local Division Munich dismissed an application for provisional measures requested by SES-imagotag SA against Hanshow Technology Co. Ltd, Hanshow Germany GmbH, Hanshow France SAS and Hanshow Netherlands B.V. based on the unitary patent EP 3 883 277 for non-infringement. The basis for this finding was claim construction. Here, the Local Division Munich considered the original version of the claims, i.e. the claims originally filed with the patent application. Thus, essentially, the Local Division Munich embraced the file wrapper estoppel doctrine and established specifically that the original claim version in connection with amendments made during prosecution can be used as a guideline for interpretation. According to the Local Division Munich, claim amendments of EP 3 883 277 made during prosecution aimed at the specification of the technical effect of the protected invention which as such is important for function-oriented claim construction.

The order was rendered by an international panel of judges consisting of three legally qualified judges Matthias Zigann (Germany), Tobias Pichlmaier (Germany) and Margot Kokke (the Netherlands) and a technically qualified judge, Uwe Schwengelbeck (Germany). This set up is particularly interesting as statements made during prosecution or opposition proceedings have to date not been used as binding claim construction material by German courts (in some cases a secondary relevance was attributed by assuming that such statement may be an indication for the understanding by the person skilled in the art). In contrast, according to Dutch practice, a third party may always refer to the prosecution history and use it to the disadvantage of the patent owner. As a consequence, the Local Division Munich rather followed the Dutch than the German practice clearly showing that the UPC judges "thinkUPC" irrespective of their nationality and local tradition. They make up their own mind and do not feel bound at all to any national practice.

However, lacking a broader case law base and appellate case law so far, it is not clear whether other divisions and the court of appeal will follow suit, differentiate depending on whether published patent-related documents or the broader prosecution file are at issue, or refuse to follow this approach from the outset.

Notably, SES-imagotag SA appealed the order and the decision of the court of appeal is still outstanding.

[2] See GRUR Patent 2023, 34 for the case law of Germany, France, Italy, Austria, the Netherlands, Belgium and Sweden re. the doctrine of file wrapper estoppel.

In our view, the file wrapper estoppel is an important guideline for claim construction as it can show what the applicant actually wanted to protect (or not) and how far the scope of patent protection shall extend in this regard. It allows a better assessment of whether or not there was an intention to limit the scope of protection by respective amendments and/or statements during prosecution and opposition proceedings.

It remains exciting to see how the court of appeal will decide the present case and how the different approaches of the UPCA member states regarding the doctrine of file wrapper estoppel will ultimately be harmonized by the UPC.

About the Authors:

Tilman Müller-Stoy is widely recognized as a leading German patent litigator and already one of the pioneers at the European Unified Patent Court. With over 20 years of experience in IP, he has handled several hundreds of patent disputes in courts and patent offices, with a focus on high-value, multinational matters. He frequently takes on a coordinating role, acting as the European lead counsel, so clients benefit from his solid understanding of the laws and procedures of all relevant jurisdictions. Tilman is particularly sought after in SEP/FRAND matters, having in-depth knowledge of numerous standards and related industry practice including the underlying economics. He assists his clients not only in such litigation but also in avoiding or preparing for it – be it as lead negotiator be it as trusted advisor in the background. He has vast experience not only in defending against, but also creating, evaluating, and enforcing major licensing programs, including compulsory licensing proceedings in the pharmaceutical area. He is particularly active in the high tech, automotive and life sciences sectors. Tilman frequently speaks at international IP conferences, has authored many peer-reviewed articles on patent litigation, is a board member of LESI, a honorary professor at Munich Technical University where he teaches patent law since 2008 and a member of the editorial board of EPLAW.

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Novelty:

Understanding Perceptions and Challenges in Innovation

By: Monique Heystek

Monique Heystek is Technology Transfer Specialist at the University of the Western Cape where her work is focused on IP & Contracts. Monique holds degrees in both Plant Biotechnology and Law and was Administrative Head of Patent Renewals at Spoor & Fisher before joining the University of the Western Cape.

In the pursuit of innovation, understanding the obstacles that impede support for creative ideas is crucial. Creative ideas serve as the catalyst for innovation, a shared objective across the realms of arts, sciences, and business. A recent article published in Nature Human Behaviour[1] by University of Utah researchers Johnson and Proudfoot, delves into a specific challenge faced by creative ideas, namely a decrease in an idea's perceived worth with an increase in the idea's novelty.

Innovation is crucial for societal progress and resilience, providing transformative solutions to pressing challenges in an increasingly dynamic and interconnected world. Innovation relies on the generation and implementation of novel and creative ideas. Innovation is dependent on novelty because the introduction of genuinely new and inventive ideas is the catalyst for transformative changes, driving progress, and differentiation in various fields.

It is therefore not surprising that novelty is a cornerstone of the patent system. It serves to incentivize and protect genuine innovation. Requiring novelty ensures that patents are granted only to ideas that represent a significant departure from what is already known. This prevents the issuance of patents for inventions that are truly innovative or merely represent incremental improvements.

This process not only safeguards the rights of inventors but also facilitates the dissemination of knowledge, ultimately benefiting society by advancing science and technology.

[1] Johnson, W., Proudfoot, D. Greater variability in judgements of the value of novel ideas. Nat Hum Behav (2024). https://doi.org/10.1038/s41562-023-01794-4

A crucial element for new ideas to transpose into true innovation, is the acceptance, adoption, and collaboration among the creators of these ideas without which the successful implementation and impact of innovative concepts willnot realize. It is so that humans often appear to struggle with unfamiliar concepts, and the greater the novelty of an idea, the more apparent this challenge becomes. Recent research on the psychology of idea evaluation by Johnson and Proudfoot confirms the human bias against novelty as a contributing factor to why creative ideas generate resistance. Evolutionary psychology has long known about this human bias against novelty, often referred to as neophobia or aversion to the unfamiliar, where a preference for familiar and known environments provided a survival advantage during the evolution of our species. Practically this bias manifests as a tendency to favor the status quo, resist change, and feel discomfort or skepticism towards novel ideas or experiences. Inquire with those who have participated in discussions during dinner on subjects like self-driving cars, cryptocurrencies, or lab-grown meat. These topics often spark disagreement, fostering a diverse range of strong opinions that fuel robust debates and occasionally result in awkward silences. While this inherent aversion to novelty may have once served a protective function in early human history, in modern times, it can impede innovation and adaptation to new and beneficial concepts.

The inclination of certain individuals toward higher-novelty ideas could be attributed, in part, to the personality trait of "openness to new experiences." Individuals with a high level of openness to new experiences tend to be more receptive to unconventional and innovative ideas. In the context of the study, these individuals may be more inclined to appreciate and value higher-novelty concepts, contributing to the observed diversity in perceptions. Their openness may lead to a more positive reception of groundbreaking innovations, influencing how they assess the utility and practicality of novel ideas. Conversely, individuals with lower openness may exhibit a more conservative approach, potentially contributing to the observed variability as they may be less receptive to unconventional concepts. Understanding the interplay between personality traits, particularly openness to new experiences, and the diverse judgments of novel ideas sheds light on the intricate dynamics influencing how innovations are perceived and valued across different individuals.

In a series of five studies, Johnson and Proudfoot investigated the relationship between the novelty of ideas and variability in value judgments across different contexts. Their research was aimed at determining whether higher-novelty ideas exhibited greater variability in value judgments compared to lower-novelty ideas. The studies encompassed various contexts, including business venture pitches, films premiering at the Sundance Film Festival, evaluations of abstract art, and ideas for sandwiches. In the study involving business venture pitches, the researchers found more variability in value judgments for higher-novelty pitches. Similarly, with films at the Sundance Film Festival, higher-novelty categories exhibited greater variability in audience ratings. Experimental evidence with abstract art and a study involving sandwich ideas further supported the notion that as ideas become more novel, there is more variability in how evaluators judge their value. A final study explored the impact of this variability on participants' intent to invest in an idea, revealing that higher variability in value judgments led to lower intent to invest, with perceived risk mediating this effect. Overall, the studies suggest a consistent link between idea novelty and increased variability in value judgments across diverse contexts.

It could be interesting and valuable to consider the implications of Johnson and Proudfoot's findings in the realm of Technology Transfer. In technology transfer, the process of moving innovations from research institutions to the commercial sector, understanding how novel ideas are perceived and valued is crucial. The observed variability suggests that the reception of innovative technologies may be more diverse, making it important for stakeholders in technology transfer to consider and navigate differing opinions and judgments. This variability in perception could impact decision-making processes, such as investment choices or collaboration agreements, emphasizing the need for effective communication and strategies to address diverse perspectives when transferring novel technologies from research to practical applications.

The findings of the study could furthermore have implications for patent professionals, including patent attorneys. The observed variability in how people perceive and value higher-novelty ideas suggests that patent professionals may encounter a broader range of opinions and attitudes when working on patent applications for innovative concepts. This variability could impact aspects such as patent prosecution, where they interact with patent examiners to secure patent rights. The diverse perceptions of novelty and value may require patent attorneys to carefully tailor their arguments and strategies to address different perspectives during the patent examination process.

Additionally, patent attorneys involved in patent litigation or licensing negotiations may need to consider the potential for varied interpretations of the value of higher-novelty inventions. Crafting effective legal arguments and negotiation strategies may require an awareness of the diverse viewpoints surrounding the perceived value of innovative technologies.

In the realm of patent law, the utility requirement mandates that inventions must possess practical utility or usefulness. The observed diversity in how individuals perceive the value of higher-novelty ideas may furthermore suggest a level of subjectivity in assessing the practical utility of inventions. This subjectivity may necessitate careful consideration during the utility evaluation process, with patent examiners and applicants adapting to varied opinions. The study prompts attention to the potential need for an adaptable evaluation framework that accommodates a broader spectrum of perspectives. Patent professionals, including examiners and applicants, may need to navigate these challenges in order to effectively meet the utility standard during the patenting process.

In conclusion, Johnson and Proudfoot's research highlights that, despite the widespread desire for novel products and solutions, highly novel ideas, crucial for innovation, tend to generate disagreement among evaluators. Evaluators seem to lack common templates for assessing highly novel ideas, relying more on idiosyncratic knowledge and preferences. This variability is perceived negatively, reducing support for novel ideas. The findings of this study may hold implications for various facets of the innovation landscape. In the field of technology transfer, where the movement of innovations from research institutions to the commercial sector is a critical process, the observed variability in perceptions of novel ideas underscores the importance of acknowledging and navigating diverse opinions. Stakeholders must be cognizant of this diversity as it can significantly influence decision-making processes, including investment choices and collaboration opportunities.

Shoprite Checkers vs Pick n Pay

A whole herd of horses from the same stable?

By Hugo Prinsloo and Lana Giliomee

Introduction

Typically, in the context of FMCG, passing-off judgements deal with a single product-to-product comparison, which is why the recent judgement handed down in **Shoprite Checkers (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd** (Hereinafter Checkers and Pick n Pay, respectively) by Acting Judge President Goliath AJP in the Western Cape High Court in South Africa, is particularly noteworthy. In *casu*, the Court dealt with passing-off in respect of an entire range of products.

The product lines in question, and related marketing, were ultimately found to be so similar that they are likely to be perceived by the ordinary consumer as a proverbial herd of horses, emanating from the same stable.

Pick n Pay has been interdicted from passing-off its Crafted Collection products as those of Checkers (more particularly, its Forage and Feast range).

Goliath AJP's well-reasoned and decisive judgement, bolstered by recent case law, provides useful guidance on passing-off in South Africa.

We will discuss the background and key takeaways from Goliath AJP's judgement.

Background

Checkers is owned by the Shoprite Group, the largest supermarket retailer in Africa. Both Checkers and Pick 'n Pay are retail giants and prominent brand owners in South Africa and the wider region, making this judgment particularly important in providing certainty for litigants in the FMCG sector.

In November 2020, Checkers launched its Forage and Feast luxury range of products, which placed an emphasis on high-quality ingredients, responsible sourcing and seasonality.

Around a year later, Pick n Pay launched its Crafted Collection premium product range.

The marked similarities between the get-ups of these ranges (Figure 1) led to this dispute:

Pick n Pay's Crafted Collection range was launched after an extensive brand development process through its branding service provider (Daymon Design and Branding "Daymon"). Pick n Pay noted in its design brief that Checkers had launched its Forage and Feast range, and that Pick n Pay was compelled to stay away from the dark blue colour or design elements used by Checkers.

Figure 1 Forest and Feast vs Crafted Collection

Looking at the photograph above, it is evident Pick n Pay's design direction changed materially at some point.

The judgement also notes Checkers' Forage and Feast range formed part of Daymon's research and benchmarking process in conceptualising the Crafted Collection range and concludes this *"incontrovertibly points in one direction, namely, that the Crafted Collection range could not have been conceptualised based purely on market trends, but appears to be a calculated imitation."*

Passing-off

In South Africa, as derived from English common law, passing-off protects against deception or confusion arising from a misrepresentation by another trader concerning a trade source or business connection of the latter trader's goods.

Goliath AJP's judgement clarifies the following aspects of our common law in relation to passing-off.

Product ranges

A passing-off enquiry requires an assessment of the get-ups of two products in their entireties, including the way in which the products are marketed to the public.

The present matter considered passing-off in the context of a larger product range and Goliath AJP held that:

> "*While it is accurate to say that not every item in the Crafted Collection range resembles an item in the Forage and Feast line, a significant proportion of the items possess a comparable visual and tactile experience, rendering them nearly indistinguishable from the Forage and Feast line*".[1]

The judgement shows an enquiry into passing-off can be broad enough to take an entire range of products into account, where contextually appropriate.

<u>The parties' products are sold exclusively in their respective stores only – does this make a difference?</u>

In summary, no.

It was found here that it is normal for retailers to stock product ranges from third-party suppliers and there is a reasonable inference to be made by consumers that the two product ranges could have emanated from the same manufacturer or source.

In arriving at the conclusion that "*consumers are likely to mistake the two product lines for horses from the same stable, with the sole distinction being the retailer from which they purchase the merchandise*", Goliath AJP made the following remarks in comparing the parties' respective product ranges[2]:

"*The products in respect of which the marks pertain are identical or comparable. Both product lines are competing ranges in the same premium and luxury consumable market. It is evident that the get-ups are visually, and conceptually similar. A cursory look at the respective products reveals that the visual similarities between the get-ups are remarkable. The colour combination of navy blue and gold is being used in similar proportions. The packaging and bottling of the products are identical. The artistic layout of the products is also remarkably similar. Both products labels display the dominant use of the navy background, the use of white and gold fonts in the descriptors, and the suspiciously similar placement of the images of the*

[1] Para 34
[2] Para 33

ingredients. The similarities in the get-up incorporate the same basic identical, fundamental elements.

Having regard to the degree of similarity, the respondent's inconspicuous Pick n Pay logo renders the common elements in the get-ups more prominent. Complicating the perplexing resemblance is the lack of the Checkers label appearing on the "Forest and Feast" products."

Beware - artificial dissection of get-up is not permissible

As reputation is the cornerstone of a successful case for passing-off, counter-arguments in these matters are often aimed at the individual components of the get-up which are, so the argument goes, not independently distinctive or unique enough to fulfil a source-denoting function.

These counter-arguments need to be approached with caution and need to be borne out by the facts and the evidence advanced.

The relevant assessment requires an evaluation of the respective get-ups in their entirety – contrived and artificial dissections thereof are impermissible as Goliath AJP found when she stated the following:

> *"The manner in which the Respondent dissected the overall get-up of the Forage and Feast range is artificial and contrary to the well-established test to be applied in matters of this nature."*[3]

The judgement illustrates use of completely dissimilar primary trade marks or brand names (i.e. **FORAGE AND FEAST** and **CRAFTED COLLECTION**) do not necessarily save a rival from a finding of passing off where there are overwhelmingly similar elements on the overall packaging that could lead to an association, in the minds of consumers, between the respective products.

Conclusion

As we know, the basis of any claim for passing-off is reputation.

Proving a protectable reputation in a particular get-up may be challenging as the evidentiary burden is high. The present judgement reaffirms reputation can be inferred with reference to extensive sales and marketing and strong market presence.

This judgement has shown passing-off remains a robust remedy in South Africa to protect against improper misrepresentations by rival traders and resultant damage this could cause.

If your product can be perceived by consumers as a horse (or, like in this matter, a herd of horses), from another's stable, it's best to think twice before you saddle-up.

[3] Para 38

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UNDER THE (social media) INFLUENCE(r): An Overview of the SAHRC Social Media Charter

By: Koketšo Molope

Koketšo Molope is an attorney of the High Court of South Africa who provides multidisciplinary legal consulting services, primarily focused on litigious and commercial matters. Molope is a certified Trade Mark Attorney, and a Council Member and Fellow of the South African Institute of Intellectual Property Law (SAIIPL).

Koketšo serves as the Chairperson of the board of the Visual Arts Network of South Africa (VANSA) and is passionate about the commercialisation and enforcement of intellectual property rights in the arts.

This is no ordinary defamation case. It is a case that sheds some light on the *South African Human Rights Commission Social Media Charter*, as well as its role in preventing and/or lessening prohibited practices on social media platforms.

BACKGROUND AND FACTUAL MATRIX

In the *Native Child Africa (Pty) Ltd v Mary Oluwatobiloba Akinwale* (2023-125850) [2023] ZAGPPHC 2007 case the applicant, Native Child Africa (Pty) Ltd ("**Native Child**" or "**the Applicant**"), sought an urgent interdict against the respondent, Mary Oluwatobiloba Akinwale ("**Akinwale**" or "**the Respondent**"), for an interim order to restrain Akinwale from, *inter alia*, (1) publishing defamatory statements and posts on social media about the Applicant, (2) enticing the public to boycott the Applicant's business, (3) removing all defamatory statements and posts about the Applicant, and (4) posting an apology for any defamatory statements the Respondent made about the Applicant.

In summary, the Applicant is in the business of selling natural hair products online and in retail stores such as Clicks and Dischem. Since its establishment in 2016, the Applicant has an employee base of 50. Part of the Applicant's social media campaign includes the use of social media influencers to serve as its brand ambassadors. The ambassadors are required to promote the Native Child ® brand on their respective social media pages, to reach an agreed amount of insights, in exchange for payment.

Similarly, Akinwale entered into a brand ambassador agreement with the Applicant, which lasted for a period of only 2 weeks, as she failed to reach the prescribed target of insights agreed between the parties. She was therefore not entitled to payment.

Being disgruntled by this, she embarked on a smear campaign accusing the Applicant of unethical business practices and exploitation. She went on to encourage her followers on social media to repost her defamatory posts about the Applicant and to boycott the Applicant's business.

Since the publication of the defamatory posts, the Applicant claims to have suffered a significant decline in the sale of its products and endured harassment by the public over email, Google reviews, and on the Respondent's social media pages. Despite various attempts to resolve the dispute with the Respondent, and calling on the Respondent to cease her unlawful conduct, the Respondent nonetheless chose to disregard the Applicant's demands and even went as far as making false accusations about the Applicant.

During the court's consideration on whether or not the Applicant has fulfilled the requirements necessary to obtain an interim interdict against the Respondent, the court made reference to the guidelines set out in the *South African Human Rights Commission Social Media Charter* ("**the Charter**") and the importance of using social media platforms responsibly. Without burdening the reader with the complete factual matrix of the case and the relief granted by the court, the focus of this article is on the impact of the Charter on brand ambassador agreements.

SAHRC SOCIAL MEDIA CHARTER

The purpose of the Charter is to prescribe guidelines for social media users, and to address *"issues such as – harmful expression, defamation, privacy, crimen injuria, harassment and bullying, image based violence, disinformation, misinformation, safety of children and cyber bullying".*

The Charter is a practical tool for those who require *guidance on "the steps a person can take if their rights or the rights of others are violated".* It also focusses on the need to protect vulnerable groups, such as children, by prescribing ways in which they can be protected on social media platforms.

Whilst our law recognises one's freedom of expression, this right should be exercised with due consideration to a trading entity's right to its good name and reputation – which right is enforceable under the common law for defamation.

LESSONS LEARNT

It is no doubt that social media platforms are capable of reaching millions of people, and it is consequently able to cause significant damage to a brand's goodwill and reputation. It is therefore prudent for trading entities who offer brand ambassadorial opportunities to make reference to the Charter in its contractual terms. Furthermore, it is sagacious for social media influencers to familiarise themselves with the Charter and the responsibilities which flow from it.

Considered as a personal contract, the Charter bolsters an individual's ability to advance their rights on social media platforms. This judgment is an awesome display of the use of the Charter and its effects on brand ambassadorial transactions.

ARTIFICIAL INTELLIGENCE – THEN AND NOW

By Andre van der Merwe

INTRODUCTION

Artificial Intelligence ("AI") has been in use for several decades, and more lately its use has been widespread in our lives, although not always discernable by the general public. This included automatic replies to emails, answering phone enquiries, providing health advice, assisting in medical and medicine research, assembling motor cars, and selecting the advertisements we see on social media.

Significant recent advances in AI systems have led to so-called generative AI that can be used to create wholly novel outcomes or content. Generative AI represents a major forward step - and it could lead to and promote enormous creativity and scientific discoveries, and overall could enable humanity to achieve unimaginable levels.

Understandably, the demand for generative AI programs has been immediate and enormous – and those programs have been adopted very rapidly in recent months by fascinated and "hungry" users in various industries and businesses. Amongst the generative AI programs in greatest demand have been ChatGPT and DALL.E, and in January 2023 demand for ChatGPT reached 100 million monthly users (- a faster rate of adoption than Instagram or TikTok). At present there are hundreds of similarly fascinating generative AI programs available, with for example one of these enabling a user to convert simple instructions into computer code.

Not surprisingly, the watching world, and even AI experts, have become increasingly concerned that such AI systems could become as smart as humans (or even smarter). Flowing from this is the fear that this could result in potentially dangerous and unforeseen consequences! In addition, although generative AI has enormous promise and potential, as mentioned above, the present rush could also prove to be catastrophic. While companies hasten to improve the technology and increase their profits from the above boom, research in ensuring these tools are safe is unfortunately lagging. Accordingly, big tech and their investors are likely to repeat past mistakes, such as with social media, namely in putting growth before safety.

The AI industry is of course an independent and unregulated industry, and accordingly there is no control over what it designs and produces.

Hence there is no guarantee of safety or security in respect of the kind of generative AI program the industry could design or create. Likewise, and more particularly, there is no safety or security in what a rogue person, company, group or country that uses such generative AI could do with such a powerful AI tool. This is a fundamental and existential concern to the world at large, and the question at present is how this concern should be approached and dealt with. This is certainly a major challenge that faces AI at present.

HISTORICAL PERSPECTIVE TO AI

For persons unfamiliar with AI and its history, it appears to have begun its development following the early computer developments by Alan Turing (during and after WWII), namely in 1955 when Herbert Simon, a founding father in this field (and eventually a Nobel prize winner) working with his partner, Allen Newell (a computer scientist), programmed their "thinking machine" to prove certain theorems in *Principia Mathematica* (which provides the foundation of mathematics). It succeeded in that task, and even derived proofs that were more elegant than those derived by the book's authors, Alfred Whitehead and Bertrand Russell. When Simon sent his report to the authors, Russell was delighted and said: "I am quite willing to accept that everything in deductive logic (ie drawing conclusions from given statements) can be done by a machine."

However, Edward Feigenbaum (a computer scientist and Simon's student at that time) was less interested in deductive reasoning than inductive reasoning (ie the ability to make observations and generalize outwardly) because this is how scientists create hypotheses – the basic scientific method itself. According to Feigenbaum: "Science is the profession of induction." So, from the late 1950s he began to cull human knowledge and systematize it into (basic) systems, developing technologies that could support scientific reasoning. This approach was successful, and those "knowledge systems" created by collecting and systematizing the expertise of real-world professionals, could for example infer and provide medical diagnoses and could infer the molecular structure of chemical substances. When Feigenbaum started examining protein folding, for example, during his early career, only one protein structure was known namely hemoglobin. Today over 100 000 protein structures are known, enabling AlphaFold (an AI program developed by DeepMind) to make discoveries that can uncover medical treatments and find the cause of diseases.

By the 1960s those knowledge systems had also begun to work with, and mine, the richness of human language. Raj Reddy, a computer scientist and roboticist (a 1994 Turing award winner - jointly with Feigenbaum), was specializing in speech recognition and leading the way in the 1960s. He viewed language as a tool for thinking. It appears that those systems had indeed provided the route for today's models - but were they actually smart?

However, AI apparently first proved its worth in a different field in 1997 - when IBM's Deep Blue computer defeated world chess champion, Gary Kasparov. The kind of thinking needed to become a chess grandmaster requires a special kind of thinking and creativity, apparently believed to be among the most unique type of human thought. Computer scientist and founding CEO of the Allen Institute for AI, Oren Etzioni, has said that kind of intelligence is stunning and incredibly creative – although Reddy has said that is a result of "brute force" because large computers can come up with solutions for all kinds of difficult problems, which, when done by a human being would be thought to be creative.

From about 2010, computers became more creative. One development was that computer researchers moved away from scientific and mathematical creativity to generating "creative artifacts" including paintings, poetry, stories and architectural designs. An important development at that time was also so-called "machine learning" in which computers learn from massive amounts of data rather than being explicitly programmed. For decades previously data had been scarce, expensive to obtain, and sometimes impossible to gather. Computers had been slow and expensive. Then those issues had all changed!

In addition, in the early 2010s Silicon Valley AI researchers had realized that neural networks (such as found in the human brain) were a far better route to providing powerful AI systems than conventional programming. Accordingly, AI began to take off in 2020 with breakthroughs in neural network designs, the increased availability of data, and greater computing power. This led to generative AI - a type of AI system that can be used to create completely novel outcomes or results.

This latter development represents the most important technological step forward since social media. In the last few years, generative AI systems or tools have been adopted incredibly quickly, in available programs such as ChatGPT and DALL-E. The former system replies quite coherently to almost any verbal query (but not always totally accurately) while the latter system allows one to prepare any illustration or image that can be imagined. As indicated above, the demand for, and uptake of, these and many other such systems by industry and business has been rapid and enormous – with some amazing outcomes.

Experts in this field believe that this is merely the beginning and that generative AI systems will totally change the way we work and engage with the world, and the way creativity and scientific discoveries are promoted. They also believe that it will enable the world to achieve previously unthinkable goals. In addition, forecasters at PwC (- the accountant firm Price Waterhouse Coopers) predict that AI with this ability could increase the world's economy by over USD15 trillion by 2030. Accordingly, this development has led to massive investments in IT tech companies in Silicon Valley and also on the US stock exchange. While the technology is real, a financial bubble is rapidly expanding around this excited activity, with investors believing that generative AI could be as big a development as for example Microsoft Windows 95 or

the first iPhone. However, this frantic "goldrush" of sorts could also prove to be dangerous and potentially dangerous!

THE PRESENT CONCERN AND CHALLENGE FACING AI

Alan Turing, the "father" of modern computers, had said in 1951 that: "If a machine can think, it might think more intelligently than we do, and then where should we be?":

Reddy has said: "ChatGPT has read 100 million books. If you read a book every day, by the end of your life, you would have read 40 000 books. So, there is no way any human being can have as much knowledge." Reddy remains optimistic about AI and has said: "Great and exciting things will happen".

A combination of factors has brought us to this new frontier: large and fast computers, access to massive data, machine learning and especially generative AI. After nearly 70 years, AI has come of age - and could it potentially become the world's most powerful tool?

However great the benefits of AI could be for humanity, if, as is presently the case, profit takes precedence over safety, some AI experts have warned of existential risk. The clear and express goal of many AI companies, including OpenAI is to create an artificial general intelligence ('AGI") that can think and learn more intelligently than humans. If future AI achieves the ability to rapidly improve themselves without human intervention or guidance, then they could (with or without human assistance) potentially cause disruption, harm or damage, or in an extreme situation potentially take over from us or even wipe out humanity!

To add to the above concern, AI researchers estimate that AI's computational power is doubling every six to twelve months. It is precisely this immense power that makes the current frontier so electrifying - and therefore so dangerous for the world

What exactly do AI experts have to say about whether or not AI presents an existential threat facing mankind and the world? The views of three AI experts are set out below.

The views and opinions of two Catastrophists –

Geoffrey Hinton (Emeritus Professor, University of Toronto), one of the most influential AI researchers of the past 50 years, has had a change of mind during 2023. He has spent his career trying to build AI systems that model the human brain, mostly in academia before joining Google in 2013. He had always believed that the brain was better than the machines that he and others were building, and that by making them more like the brain, these machines would improve. However, early in 2023, he realized that: "… the digital intelligence we've got now may be better than the brain already. It's just not scaled up quite as big."

Hinton has been instrumental in the development and spread of neural networks, the dominant AI development that has enabled huge amounts of data to be ingested and processed. This has led to advances in image recognition, language understanding, and even self-driving vehicles. His work has potentially hastened the future he now fears, in which AI becomes superhuman with some disastrous results.

Developers around the world are currently racing to build the biggest AI systems that they can. Based on the rate of such development, in about five years AI systems could have 100 trillion connections – about as many as there are between neurons in the human brain. Alarmed by this, Hinton left his post as VP and engineering fellow in May 2023, explaining that he had left so that he could speak freely on the dangers of AI – and his regrets over helping to develop that technology. He is concerned about what could happen when AI is scaled up to the size of human brains – and the prospect of humanity being overtaken and possibly wiped out by the technology he helped to create.

He does not know how to prevent superhuman AI systems from taking over. He insists that he is a scientist and not a policy man. So, instead he is sounding the alarm: speaking in public, giving interviews with the media, and speaking to policy-makers, including officials in the UK Prime Minister's office, to the Canadian Prime Minister, Justin Trudeau, and to US Senators Bernie Sanders and Jon Ossoff.

Yoshua Bengio (Professor, University of Montreal and Scientific Director, Montreal Institute for Learning Algorithms), one of the most important AI researchers of the past three decades, understands better than most what AI can do. Upon encountering ChatGPT in early 2023, he had a "visceral" reaction - adjusting to his new understanding of how quickly AI could surpass humans.

In March 2023 he spoke out about the risks that AI poses, just weeks before Hinton did as well – without the two of them talking to each other. Bengio and Hinton separately estimate that AI that could outperforms humans at all tasks will be developed in the next five to twenty years.

Bengio has been part of teams which have made breakthroughs that have laid the groundwork for recent advances in AI, such as laying the foundation for modern large language models (LLMs). Another relevant advance was a new way to train AIs by having two computers compete against each other, one generating content and the other judging that content quality.

He intends to harness his energies on the current situation which he says "looks desperate for humanity." He believes that AI could overpower us in the future but that things could get "tricky" well before then. "The nearest thing is meddling with elections. That could happen by the next US election (in 2024)."

In 2023 he testified before the US Senate about the dangers of AI, and he has written papers about AI policy and governance. He intends to move the focus of his work

towards technical AI-safety research. He has said: "I'm concerned that powerful tools can have negative uses and society is not ready to deal with that. Let's slow down and let's make sure we develop better guardrails."

The views and opinions of an Optimist –

Yann LeCun (the Chief AI Scientist at Meta and a Computer Science Professor at NYU) had hypothesized in the 1980s that artificial neural networks could be designed to imitate the human brain. His ideas were widely mocked at that time but, based on technical breakthroughs in the field, his ideas would provide the basis for the current generative AI revolution.

LeCun has dismissed existential fears around AI as "preposterous" and akin to an "apocalyptic cult" He believes the current craze around large language models – including ChatGPT – is a misdirected fad that will soon hit a dead end! He says: "A lot of people say AI is not safe. But they are naïve. They have no idea. It's a complicated engineering problem that we haven't even begun to solve because we don't have a good design for a super-intelligent AI yet. I think there's a way to make them safe by designing them so that they have to abide by a number of objectives. You hard-wire those objectives so the system, by construction, cannot produce an output that does not abide by the guardrails in the process of accomplishing a task. And that's not as difficult an issue as people have made it out to be."

As to the standing of the above-mentioned three AI experts, they were the joint recipients of the 2018 ACM A.M.Turing Award – considered the "Nobel Prize" for computing.

THE WAY FORWARD?

At present AI experts and the world continue to debate the potential for AI threats, as indicated above, and various other AI issues. While this is ongoing, the process of AI regulation by government has started in 2023 in various countries and regions of the world.

The USA - In the USA, a forum consisting of US senators and the country's top tech leaders met in September 2023 to set the tone for collaboration between the world's biggest tech companies and Congress as it seeks to pass bipartisan AI legislation in 2024. Legislators have put forward a series of proposals for various concepts such as an independent federal office to oversee AI, liability for civil rights and privacy violations, and a ban on deceptive AI-generated content in elections. Without doubt, US AI legislation will be required to address various concerns such as the environmental costs of training large models, privacy, surveillance, medical applications, national security, and misinformation. Time will tell how Congress takes such legislation forward.

On 30 October 2023, President Joe Biden signed a comprehensive executive order to safeguard against threats by AI but he acknowledged that: "*We still need Congress to act*" – and thereby that regulation by federal law must still be implemented.

The European Union (EU) – On 8 December 2023 the European Parliament and Council agreed to adopt the EU AI Act. This amounts to the world's first comprehensive AI law and regulation, which aims to ensure that AI systems are "safe" and "respect fundamental rights and EU values" while encouraging AI investment and innovation in the EU. The Act will come into operation after two years while regulatory prohibitions will come into operation after six months.

The United Kingdom (UK) – In the spring of 2023 the UK published its policy ie a "White" Paper entitled: "AI Regulation: A Pro-Innovation Approach." Responses were due by 21 June 2023 to inform how the regulatory framework would develop. The Bill proposes safeguarding fundamental rights and aligning with principles such as transparency and fairness (and also interestingly according to the provisions of the EU General Data Protection Regulation). It remains to be seen how this Bill develops and progresses through the normal UK legislative procedure.

The People's Republic of China – China in the meanwhile has provided an outline of policies to regulate its domestic AI sector. These are intended to balance state control with support for its AI and related companies to be global competitors.

The Republic of South Africa – Currently there is no specific legislation for, or regulation of, AI in South Africa. For information, the Presidential Commission on the 4th Industrial Revolution had recommended revising and creating policies and legislation to empower stakeholders with responsible technology use. Nothing further has come of this to date but recent developments in other major countries may well encourage South Africa to focus on the need for specific legislation in the near future.

The African Union – In 2021 the African Union lodged its "Africa's AI Blueprint" proposing that regional AI Centres of Excellence be established in Africa to encourage collaboration across various AI fields (in Africa). Nothing further has been heard of this proposal to date.

International Collaboration - Because AI and its potential threats are universal in nature, a major question is whether or not major (and more particularly IT-producing) countries will collaborate in adopting an international AI agreement or convention. An international convention is generally the standard approach taken with such wide-ranging matters, invariably under the auspices of (an agency of) the United Nations.

In any event, towards the end of 2023, representatives of 28 countries had met at Bletchley Park in England and signed a so-called "Bletchley Declaration", including the USA, UK, China and India. This Declaration aims to collaborate and protect against potential harm caused by AI.

Interestingly *inter alia* Elon Musk had attended and spoke at that conference, confirming that he was concerned by the potential harm that AI could cause in future, and indicating his support for moves to regulate AI to avoid such harm. It was agreed by the parties that further meetings would be held.

CLOSING REMARKS

While AI holds amazing potential for humanity, it is also at a dramatic and challenging frontier at present. Dynamic developments of a technical, economic and political nature are taking place to deal with these challenges. So, we are living in very interesting times – and we shall see how these developments unfold in the near future, especially those relating to the adoption and implementation of safeguards by countries and regions for AI systems going forward.

Andre van der Merwe is a former director of Kisch IP and is now a retired patent and IP attorney.

REFERENCES:

TIME MAGAZINE (Special Edition) on Artificial Intelligence - published December 2023 - and several articles therein; and

Various Google Internet searches

Copyright Amendment Bill 2022– a good or a bad idea?

By Allison Williams

Allison is the Head of Intellectual Property At Norton Rose Fulbright South Africa Inc (South Africa).

She is an intellectual property and commercial lawyer based in Durban. She has extensive experience in intellectual property law of all kinds and descriptions, including the registration and enforcement of trade marks globally, copyright, passing off and unlawful competition, franchising, domain name dispute resolution, advertising complaints and transactional IP work, such as M&A deals containing IP elements or aspects, due diligences, licensing, assignments and, in particular, IP structuring. Allison also has significant experience in social media take downs involving IP infringements, including on Facebook, WhatsApp, LinkedIn and YouTube, as well as through the Internet Service Providers' Association of South Africa (ISPA).

The aim of the Copyright Amendment Bill 2022 is to aid the economic interests of authors of works whilst simultaneously adapting to technological advancements. The Bill has proposed various changes to the Copyright Act. Numerous iterations of the Bill have been promulgated over many years, and there are conflicting views as to whether the Bill in its current form is a good or a bad thing for South Africa. Many believe that it is progressive because it provides for access to copyrighted works for people with disabilities. Others, including copyright experts and the owners of the copyright works, view the Bill as problematic, because it can be seen to undermine the rights of such owners to their property and it could place our country in contravention of international treaties. For instance, the Berne Convention for the Protection of Literary and Artistic Works requires South Africa to give citizens of other member countries the same protection it gives to the owners of copyrighted works in South Africa. The Bill does not define exactly what would be considered a disability which is problematic. Some disabilities are not permanent.

In terms of section 25 of the Constitution, the arbitrary deprivation of property is prohibited, which aids the view that author's and copyright experts' have on this topic. However this section would compete with the right to equality under section 9 of the Constitution. Ultimately, a balancing act will have to be struck between the two competing rights and the limitations provisions in section 36.

In *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 the Constitutional Court confirmed that the Copyright Act is unconstitutional because it infringes the rights of blind and visually impaired individuals, by not affording them accessible format copies of copyrighted works without the permission of copyright owners. The court found that the Copyright Act in its current form infringes various sections of our Constitution. The court found that depriving blind and visually impaired individuals of access to reading material gives rise to prejudice, which is irreparable, incalculable, and difficult to articulate.

In terms of the Bill, the following definitions have been inserted to rectify the rights infringed:

- 'accessible format copy' - entails any copy of a work in a different form than that of the original, to provide attainable access to those with disabilities, which access must be as easily obtainable as it would be for those without such impairments.

- 'disabled person' - one who has a physical, neurological, intellectual, or sensory impairment and who requires a work to be in such a format for them to use and access the work, as easily as it would be for a person without such impairment.

The Bill makes provision for prescribed person to make available an accessible format copy, for the benefit of an individual with a disability without the authorisation of the copyright owner. This is subject to conditions, including:

- the person undertaking to provide the work to the individual with a disability, must have lawful access to the copyrighted work or a copy of the copyrighted work;

- whilst undertaking to provide a copy of the copyrighted work, the person must respect the integrity of the original work, even though the work will be altered to such an extent to make it accessible to an individual with a disability; and

- the process, as a whole, must be done on a non-profit basis.

The Constitutional Court held, in order to better weigh up the interests of all stakeholders concerned, the following guidelines, to name a few, must be adhered to. The subject of the exception must be clearly set out. This would entail an explanation of the particular works that may be made into accessible format copies. The court restricted the latter to literary works and artistic works contained in literary works. This is in line with the Marrakesh Treaty. The beneficiaries, the extent of the exception, and those authorised to make an accessible copy available, must be clearly defined, to circumvent any uncertainty.

The Bill cannot be said to be all good or all bad. The Bill, should however, be applauded for its progressive nature, but the guidelines set out above must be considered. A revised, less broad version should be adopted for the Bill to pass constitutional muster. A potential commercial compromise is for the Bill to be amended to provide that the owners of copyrighted works are remunerated for the use of their property. This concept of "compulsory licensing" is not uncommon in our intellectual property law.

The Intellectual Property Laws Amendment Act, 2013 a Decade on

By: André Myburgh

Ten years ago, on 10 December 2013, the Intellectual Property Laws Amendment Act, commonly referred to as "IPLAA", was published as an Act of Parliament assented to by President Zuma. It was to take effect from a date to be promulgated by the President. Ten years later, that has not happened.

In the light of the controversies swirling around the Copyright Amendment Bill, it might be worthwhile looking at IPLAA to see if any lessons can be drawn from it.

Like the Copyright Amendment Bill, IPLAA is the product of the Regulation Division of the Department of Trade Industry and Competition (DTIC), and it, too, was shepherded through the National Assembly by the Portfolio Committee on Trade Industry and Competition.

The Copyright Amendment Bill has been in process for 6 ½ years now; IPLAA, introduced as a bill in 2010, took 3½ years to be passed. Both bills were the subject of heavy criticism by academics, business, and the legal fraternity. Both were delayed by their being reintroduced to the National Council of Provinces to serve before the Provincial legislatures following concerns by the President – President Zuma in the case of IPLAA and President Ramaphosa in the case of the Copyright Amendment Bill – that the correct procedure prescribed by the Constitution had not been followed.

IPLAA sought to establish rights of copyright for traditional works, that include literary, musical or artistic works with an indigenous origin. The exclusive rights for traditional works are far more expansive than the existing exclusive rights of copyright in literary, musical and artistic works. IPLAA allocates 13 exclusive rights to traditional works, whereas the Copyright Act currently has only 7 for literary and musical works and 6 for artistic works, and, after its amendment, will have 10 and 9 respectively.

IPLAA's amendments to the Copyright Act were introduced and passed despite the rules of copyright being a very poor fit for traditional works.

Copyright requires a work qualifying for protection to be original, reduced to material form, and made by an author, who would usually be a natural person.

On the other hand, an indigenous work might have existed for time immemorial, only needs to 'be capable of substantiation from the collective memory of the relevant indigenous community', and its authorship and ownership are granted to an indigenous community, which itself is not capable of objective fixed identification and which does not even need to exist anymore. The term of copyright for literary, musical and most artistic works is the life of the author plus fifty years; for an indigenous work, it is indefinite.

The commercial use of a traditional work is subject to a royalty or other benefit as determined in advance in terms of a benefit sharing agreement after the indigenous community's prior informed consent has been obtained. A benefit sharing agreement can be suspended for re-negotiation if it is not to the benefit of the originating indigenous community. In this sense, the use of traditional works is subject to uncertainty and more onerous conditions than the use of other works which are subject to copyright.

In a moment of hubris when the IPLAA bill was first passed by the National Assembly in 2011, Portfolio Committee chair Joanmariae Fubbs said 'Yes, [IPLAA] is [the] source of significant investment and lucrative expectations. For example only the architects benefitted from the First National Bank calabash World Cup Soccer Stadium design. However under this piece of legislation all the communities who can trace the calabash as intrinsic to their culture can benefit through a National Trust Fund.'[1] But these expectations have never come to pass. The bill would take another two years to get the President's signature, and a decade after that it was still not operational.

Far from encouraging South Africa's indigenous culture to be celebrated in a fair way, IPLAA will, in the words of the late IFP MP Mario Oriani-Ambrosini, 'have a chilling effect. People are not going to touch it.'[2]

After IPLAA was signed into law, a law to protect indigenous knowledge, the Protection, Promotion, Development and Management of Indigenous Knowledge ("IKS") Act was introduced by the Department of Science and Technology (DST) as a bill in 2016. Despite its similar objects, the IKS Act works very differently from IPLAA. It was assented to by the President in 2019, although it, too, is not yet in operation, pending finalisation of its regulations.

In the meantime, IPLAA has stalled. An attempt by the DTIC to write its regulations in 2014 went no further. Even in the DTIC, the appetite for this law seems to be waning. The Deputy Director General of the Regulation Division told the Portfolio Committee in 2018 about "constitutional mechanisms" needed to support IPLAA while her department was working with the DST on the IKS Bill.

At its meeting of 13 September 2022, the Portfolio Committee was told by the Deputy Director-General about an unfavourable legal opinion on IPLAA that the DTIC had obtained in 2020. A couple of options were on the table, one of which was to repeal it altogether.

The Copyright Amendment Bill has no independent legal opinion backing it;[3] indeed, it does not even have a proper impact assessment.[4] The lesson of IPLAA is that these enquiries must be made before introducing a bill, not after it has been passed.

[1] Hansard 27 October 2011
[2] SAPA 'Haste on Traditional Knowledge Bill Queried' by Emsie Ferreira, 16 September 2011
[3] https://saiipl.co.za/wp-content/uploads/2023/03/20230307-Notes-for-public-hearing-Western-Cape-Parliament.pdf
[4] https://www.polity.org.za/article/copyright-amendment-bill-process-drawn-into-question-2023-05-25

Today, ten years on, there seems to be no prospect that IPLAA will ever come into force. IPLAA makes numerous changes to the Copyright Act, and, with IPLAA having been signed into law but not in effect, any later amendments reforming the Act will have to navigate the amendments introduced by IPLAA which are not yet operational.

This means that if amendments to the Copyright Act were to be passed, it would be very difficult for anyone to make sense of what parts of the Act are in force and what are not. Unless something is done, this confusing situation could exist indefinitely.

Like the Copyright Amendment Bill, IPLAA was high on good intentions, short on implementation, and full of provisions that will harm the very objects it intends to achieve. IPLAA at least had a safety net that the President could put the law into operation once the time was right, but the inaction over the past ten years indicate that the time will never be right.

Unlike IPLAA, the Copyright Amendment Bill must take effect at most two years after the President signs it into law. With the Bill having far more consequences for the country than IPLAA, this provision is sure to focus peoples' minds on how the Bill will really impact South Africa.

An earlier version of this article first appeared in Polity *on 8 December 2023 under the title "The Intellectual Property Laws Amendment Act – A decade of non-delivery".*

André Myburgh is an attorney who specialises in copyright policy and legislation and an honorary member of SAIIPL. He was a member of the Portfolio Committee's panel of experts for the Copyright Amendment Bill in 2018 and is the lead author of a book on the topic, *Copyright Reform or Reframe?* (Juta, 2023).

From the Juta Law Reports

The following judgments were reported November 2023 to January 2024

Patents - Infringement, validity and admission of hearsay evidence - Proprietors and licensees of SA patent for anticoagulant medication (plaintiffs) suing importer of medication containing same active ingredient (rivaroxaban), and its local distributor (defendants) — First defendant denying that its product (Resalto) infringing patent, and in counterclaim contending that patent invalid — First defendant seeking to introduce hearsay evidence of prior art, including posters displayed at medical conference in USA — Primary issues in dispute being (i) whether defendants' (admitted) trade in patent infringed it and (ii) whether patent was valid — Court, having canvassed relevant legal principles, ruling posters admissible as prior art — As to infringement, first defendant contending that its product did not infringe patent's claim of 'half-life of 10 hours of less when orally administered' — Court finding that plaintiffs' failure to prove half-life of Rezalto meant that they failed to prove infringement — As to alleged invalidity, court finding that plaintiff failed to prove that patent achieved what it taught, namely that rivaroxaban had plasma-concentration half-life of 1O hours or less when administered orally — By trying to cling to half-life which rivaroxaban did not in fact have, patent falling foul of s 61(1)(d) and (e) of Patents Act 57 of 1978 — Court accordingly dismissing first plaintiff's action for infringement and ordering revocation of its patent. Bayer Intellectual Property GmbH and Others v Austell Pharmaceuticals (Pty) Ltd and Others COP case No 2021/58180, Juta 2023 JDR 4802 (COP) (Collis J), 12 December 2023, 195 pages

Trademarks - Cancellation due to likelihood of confusion: TAKIS FUEGO and TAKIS BILTONG Appellant, Grupo Bimbo, a Mexican concern, was the proprietor of impugned snack food mark—

which was cancelled by High Court on application by respondent, Taki's Biltong, a South African company, the registered proprietor of another biltong/snack food mark

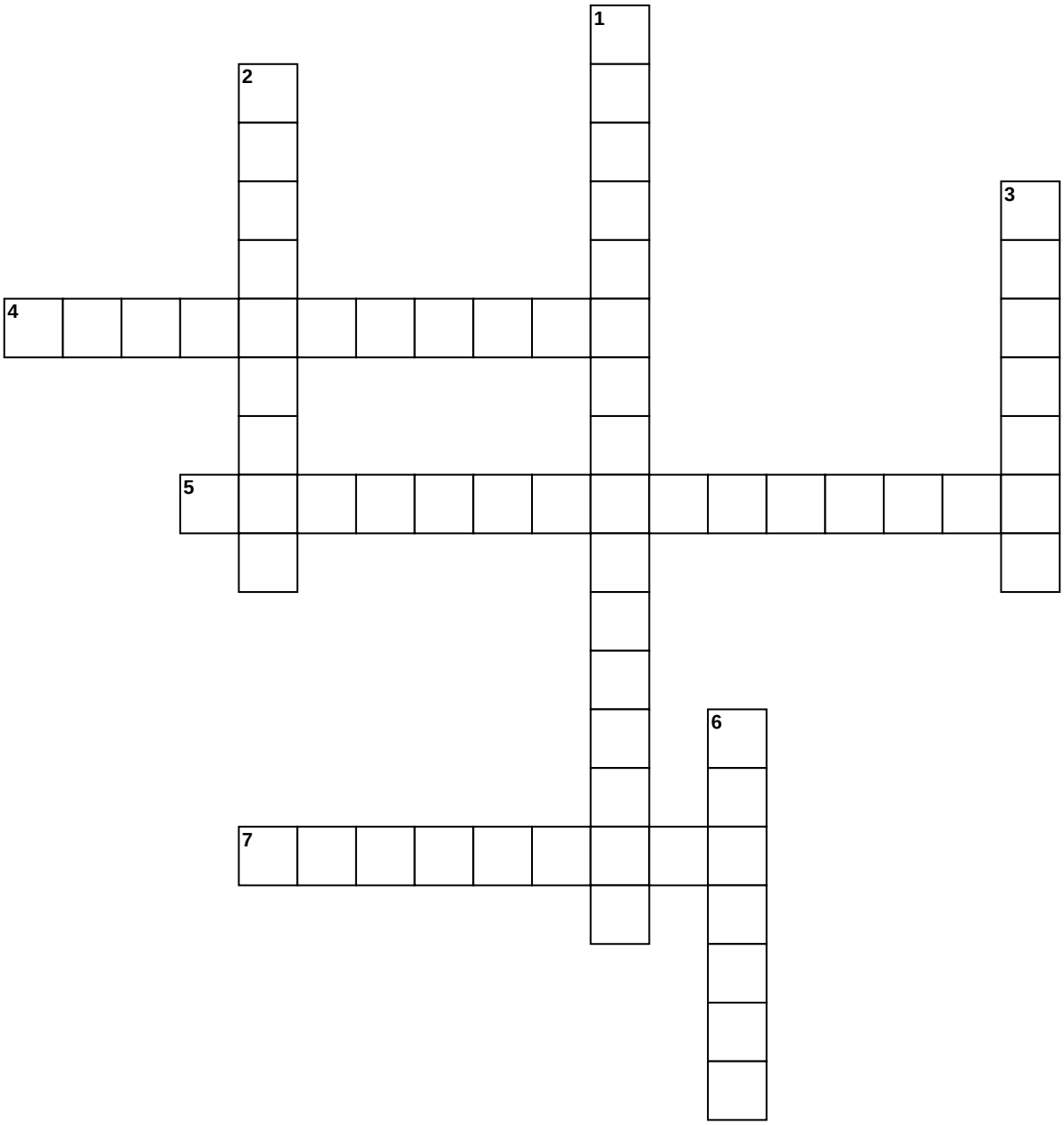
Full bench of High Court cancelling Grupo Bimbo's impugned mark under s 24 of the Trade Marks Act 194 of 1993 and refusing Grupo Bimbo's application for leave to appeal to Supreme Court of Appeal refused — In reconsideration application, SCA pointing out that dominance in both marks of invented word 'Takis' rendering marks phonetically, visually and conceptually deceptively or confusingly similar — Physical nature of the goods sold also very similar — Grupo Bimbo's mark confusingly or deceptively similar to that of Taki Biltong, and likely to take advantage of or be detrimental to Taki Biltong's mark — Grupo Bimbo's concession that Taki Biltong well-known for biltong in South Africa meaning that it had requisite reputation to sustain its case based on s 10(17) of Trade Marks Act — Accordingly, Grupo Bimbo's mark correctly cancelled by High Court — SCA therefore declining to reconsider High Court's order refusing leave to appeal. Grupo Bimbo SAB de CV v Takis Biltong (Pty) Ltd SCA case No 293/2022, Juta 2023 JDR 4805 (SCA), Kathree-Setiloane AJA (Molo Nicholls and Meyer JJA and Koen AJA concurring), 14 December 2023, 15 pages

Trademarks ***Infringement or dilution of well-known mark*** **-** Applicants, proprietors of well-known DULUX mark in respect of paint, sought final interdict against respondents to restrain them from infringing its mark by the use of its DUMAX mark, also in respect of paint —

Respondents denying that applicants proved requisites for final interdict and, in particular, that they had proved a clear right — Court finding that DUMAX not so nearly resembling registered DULUX mark as to likely deceive or cause confusion — As to dilution under s 34(1)*(c)* of Trade Marks Act 194 of 1993, 'dilution' could be accurately described as either 'blurring' or 'tarnishment' — Court ruling that present case falling squarely within parameters of s 34(1)(c) because respondents' had decided to 'sponge' on well-known DULUX mark by 'pirating the product of years of invention' and 'reaping the fruits' sown by applicants — Court accordingly granting interdict sought. *Akzonobel Coating International BV and another v Dumax Paints (Pty) Ltd and Others* FB case No 1723/2023**, Juta 2023 JDR 4454 (FB)**, Daffue J, 9 November 2023, 19 pages

Unlawful competition **-** ***Variation of interdict*** **-** The High Court in 2015 found that respondents unlawfully used applicants' confidential information and copyrighted technical drawings and interdicted them from marketing or selling products made by use of said information — Applicants, believing rights still being infringed by respondents, requesting court to rule on whether this was so — Respondents, relying on their intention to 'abandon' production line where products in question were being made, arguing that there was no point in new ruling by court — Court pointing out that mutual animosity meant that parties were unable to find own solutions to their procedural problems, thus necessitating court's intervention — History of matter showing that respondents could not be trusted not to take advantage of any lingering uncertainty about court's order — Hence, applicants had required interest in judicial determination of question whether respondent's likely continued use of existing production line would be lawful — Court ruling that separate process appropriate — Referring matter for determination by oral evidence. T*echnical Systems (Pty) Ltd and another v RTS Industries and Others* WCC case No 17470/2014, **Juta 2024 JDR 0046 (WCC)**, Bishop AJ, 2 January 2024, 35 pages

Intellectual Property



Across

[4] a type of intellectual property that comprise formulas, practices, processes, designs, instruments, patterns, or compilations of information that have inherent economic value because they are not generally known or readily ascertainable by others, and which the owner takes reasonable measures to keep secret

[5] is an American non-profit organization and international network devoted to educational access and expanding the range of creative works available for others to build upon legally and to share

[7] provides authors and creators of original material the exclusive right to use, copy, or duplicate their material

Down

[1] protects the shape, configuration, pattern or ornamentation of a product

[2] a symbol, word, or words legally registered or established by use as representing a company or product

[3] is a doctrine in United States law that permits limited use of copyrighted material without having to first acquire permission from the copyright holder

[6] a property right for an investor that's typically granted by a government agency such as the U.S. Patent and Trademark Office

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