

KEY TECH AND IP DEVELOPMENTS IN SA: 2020 / 2021



We highlight in this update the Top 10 Tech and IP developments in SA in 2020, and our predictions for each of these in 2021.

2020

The global and local shift to an online working and learning environment as a result of the Covid-19 pandemic accelerated investment in innovative technology solutions. Unique technology opportunities were created for start-ups, especially health tech start-ups (see article [here](#)). Existing tech players quickly seized the moment to deepen and extend the reach of their offerings.

2021

The Intellectual Property (IP) landscape may be changed with some laws expected to pass through the parliamentary process. Patent laws have been thrust into the spotlight in relation to accessing Covid-19 vaccines and medicines generally. The year offers opportunity in tech and telecommunications sectors for new business and investors alike.

CORE THEMES FOR 2021

Economic growth & access to technology

& medicines - The general tech theme during 2020, which will continue in 2021, is promoting and encouraging investment in SA to increase economic growth, create job opportunities, access to data and connectivity and inclusive audio and audiovisual content services and broadcasting services to all. With the global race to access vaccines, 2021 is likely to see an increased focus of public attention on the role of the patent system in limiting access to medicines.

Technology neutrality - Regulators have emphasised that a technology neutral approach must be adopted to the regulation of various technology and telecommunication services.

Technology neutrality means treating services in the same way, regardless of the technology or platform used, to ensure regulatory parity and fair competition.

Data protection - Businesses will need to comply with the Protection of Personal Information Act, 2013 (POPIA) before 30 June 2021. Consumer trust will be won over by those businesses that respect data protection.

TOP TECH DEVELOPMENT TO KEEP AN EYE ON IN 2021

Artificial Intelligence - The significant rise in artificial intelligence (AI) is infiltrating virtually every sector of the SA economy. There may be some interesting developments in the regulation of AI in 2021, as well as the legal consequences associated with deploying AI. See our insights regarding **AI and data protection** and **AI and regulatory sandboxes**. From a data protection perspective, AI champions in 2021 will be those that embed privacy into the fibre of their existence – also known as “privacy by design”. We foresee an uptake in M&A activity in relation to those AI participants that demonstrate continued success. Acquiring firms are likely to be tech giants and other firms with a desire to enter the tech market. However, issues may arise regarding the ownership, protection and commercialisation of AI systems under existing IP laws, which is likely to result in litigation, as the courts are left to unscramble these issues. Further, on the litigation front, we anticipate liability disputes – particularly liability arguments in the event of damage to property, injury or loss of life attributable to the use of AI-powered tools i.e. is it the robot’s fault or the fault of the human inventor if the use of the robot results in an accident?

2020

2021

1 COMMENCEMENT OF DATA PROTECTION LEGISLATION

After many years of anticipation, 2020 ushered in almost all the operational provisions of POPIA. POPIA is the first comprehensive protection legislation in SA and regulates the way that personal information is processed by creating 8 conditions for the lawful processing of personal information. [Read more.](#)

2 CYBERCRIMES BILL ONE STEP AWAY FROM BECOMING LAW

Parliament passed the Cybercrimes Bill, which criminalises various cybercrimes, including illegally accessing a computer system or intercepting data, cyber fraud, cyber forgery, cyber extortion and theft of incorporeal property.

The Cybercrimes Bill seeks to modernise SA's criminal laws to address cybercrimes and grants additional powers to law enforcement to investigate and prosecute crimes of this nature.

3 CRYPTO ASSET REGULATION ADVANCED

The regulation of crypto assets and crypto asset service providers gained traction in 2020, with the release of an Intergovernmental Fintech Working Group's position paper. While the paper contains many proposals on the regulation of crypto assets, it does not adequately deal with issues such as data protection and cybercrimes, both of which are key considerations in the crypto asset market. [Read more.](#)

Further, in November 2020, the Financial Sector Conduct Authority (FSCA) issued a draft declaration for public comment in which it proposed that crypto assets be declared as financial products under the Financial and Intermediary Services Act, 2002.

4 COVID-19 HIGHLIGHTS PATENTS LAW LIMITATIONS IN ACCESSING MEDICINES

The Covid-19 pandemic saw a renewed interest in questions of patent barriers to access medicines, and SA (along with India) proposed that the WTO Council waive certain provisions of the TRIPS Agreement to facilitate the supply of imported Covid-19 medicines to middle income countries during the pandemic. However, the SA Government's vocal activism on the international stage stands in stark contrast to its inaction on the domestic front in this regard since the finalisation of the National IP Policy document in 2018. [Read more.](#)

COMPLIANCE WITH DATA PROTECTION LEGISLATION

Businesses will need to be fully compliant with POPIA by 30 June 2021. The Information Regulator is expected to approve and publish guidelines in 2021, which will help businesses to interpret and comply with POPIA. Such guidelines include final Guidelines for Codes of Conduct, final Guidelines for the registration of Information Officers and a guide to assist organisations to comply with POPIA and the Promotion of Access to Information Act, 2000. The Information Regulator intends to launch a complaints handling system and manual in 2021 to assist it with handling the high volume of complaints which it expects to receive once POPIA becomes operational.

CYBERCRIMES BILL EXPECTED TO BE SIGNED INTO LAW

The Cybercrimes Bill is awaiting presidential signature and may come into force in 2021. Once the Bill is signed into law, a person found guilty of a cybercrime may be imprisoned for up to 15 years, depending on the offence. Electronic communications service providers and financial institutions will need to familiarise themselves with the reporting and other obligations imposed on them.

CRYPTO ASSETS REGULATION AND CYBERCRIME

The increased use of digital currencies such as crypto assets and the uptick in cybercrime, which has been heightened by the pandemic, coupled with the current lack of regulation of crypto assets, provides a perfect breeding ground for cyber criminals. The steps taken by the FSCA to regulate crypto assets, together with the commencement of the Cybercrimes Bill will assist law enforcement agencies to detect and mitigate against financial cybercrimes.

Crypto asset providers will need to carefully assess the legal risks associated with conducting business in a potentially newly regulated field in 2021.

AMENDMENTS TO PATENT AND DESIGN LAWS

A draft Patents Amendment Bill has been drawn up and will be submitted to Cabinet for approval before being tabled in Parliament. Although no details (beyond the 2018 National IP Policy document) are available yet, medicines access activists such as the Fix The Patent Laws campaign, Section 27 and MSF may be disappointed by any amendments, as these are unlikely to have a significant effect on existing patents, and hence access to currently existing medicines. Nevertheless, it is noteworthy that generic lenalidomide - the centrepiece for the Fix The Patent Laws campaign - recently became available on the South African market, under the existing "outdated" patent regime, while it remains unavailable in many other jurisdictions with comparable substantive law.

A draft Designs Amendment Bill has been drawn up and will also be submitted to Cabinet for approval before being tabled in Parliament. There are no details available in relation to this Bill.

We remain hopeful that there will be clarity regarding the content of the draft Patents Amendment Bill and the draft Designs Amendment Bill in 2021.

2020

2021

5 PRESIDENT QUESTIONS THE CONSTITUTIONALITY OF THE COPYRIGHT AMENDMENT BILL AND THE PERFORMERS' PROTECTION AMENDMENT BILL

The Copyright Amendment Bill and the Performers' Protection Amendment Bill were passed by the National Assembly in 2019 and were sent to the President for signature. However, in 2020 the President referred both Bills back to the National Assembly for further consideration, citing reservations about their constitutionality.

6 ICASA RELEASES INVITATION TO APPLY FOR HIGH-DEMAND SPECTRUM AND THE WIRELESS OPEN-ACCESS NETWORK (WOAN)

The Independent Communications Authority of SA (ICASA) released the Invitation-to-Apply (ITA) for international mobile telecommunications (IMT) spectrum, also known as high-demand spectrum, and the wireless open-access network (WOAN). [Read more.](#)

Interested parties have launched proceedings, amongst other things, to interdict ICASA from proceeding with the above ITAs.

7 WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES RELEASED

The Department of Communications and Digital Technologies released a White Paper containing a framework for the provision of audio and audiovisual content services. The White Paper aims to address the gap between the legislative framework that applies to audio and audiovisual content services by various means, including by amending licensing categories and relaxing ownership (including foreign ownership) restrictions. [Read more.](#)

8 REPORT ON 4TH INDUSTRIAL REVOLUTION RELEASED

The Presidential Commission (which was specifically established in 2019 to coordinate a national response plan to deal with the 4th Industrial Revolution) released a report setting out strategic recommendations to enable SA to participate in the 4th Industrial Revolution. The strategic recommendations made by the Presidential Commission include a focus on leveraging human capital and AI and reducing high data costs and unequal access to connectivity. Many state-led initiatives are contemplated in order to give effect to the strategic recommendations set out in the report, such as creating several funds and state-owned entities and drafting various policies and laws. [Read more.](#)

EXPECTED DELAY IN COPYRIGHT AMENDMENT BILL AND THE PERFORMERS' PROTECTION AMENDMENT BILL COMING INTO LAW

There remains a fair amount of work and consultation to be done for the Copyright Amendment Bill and the Performers' Protection Amendment Bill to be amended and approved by the President. SA is under pressure to ensure that these Bills are acceptable to certain of SA's international trade partners such as the US, or SA will face non-preferential treatment from such countries. Due to these factors, we expect delays in these Bills being signed into law.

TELECOMMUNICATIONS REGULATOR TO RELEASE SPECTRUM

The closing date for the IMT spectrum ITA was 28 December 2020. ICASA received various submissions of applications in response to this ITA. The closing date for the WOAN ITA is 30 March 2021.

The assignment of more IMT spectrum is expected to address constraints and challenges in the provision of broadband services in SA. It is anticipated that the assignment of more spectrum will create investment opportunities in the telecommunications sector and will bridge the digital divide between rural and urban areas.

ICASA issued a media release informing the public that Telkom has withdrawn part of the court application published in 2020.

UNCERTAINTY REGARDING CHANGES IN THE LAW REGULATING AUDIO AND AUDIOVISUAL CONTENT SERVICES

The closing date for comment on the White Paper on audio and audiovisual content services was originally 30 November 2020. However, the cut-off date for comment has been extended to 15 February 2021.

The Department of Communications and Digital Technologies has presented the White Paper to Parliament. It remains to be seen whether any laws will be passed to address the proposals made in the White Paper, and in so doing, promote access to audio and audiovisual content services and investment in the audio and audiovisual industries.

4TH INDUSTRIAL REVOLUTION REPORT: EXPECTATIONS VS REALITY

The report of the Presidential Commission is a first draft and offers limited detail on how its proposals will be delivered; by whom and the financial resources which will be required. Due to such limited detail, we do not foresee significant legal developments in this space during 2021.

2020

2021

9 COMPETITION AND REGULATORY ISSUES IN THE DIGITAL ECONOMY

The Competition Commission published a paper in 2020 which sets out the manner in which competition law and other laws should regulate the so-called digital economy (being the markets in which products and services use the internet for production, distribution, trade and consumption).

This paper proposes various strategic actions for ICASA, the Information Regulator and financial services regulators to consider, and for tech companies to be aware of. The paper transcends competition law issues and highlights issues such as access to data, data pricing, technology neutrality and data protection. [Read more.](#)

ACCESS TO THE DIGITAL ECONOMY

Many of the actions raised in the Competition Commission's paper dovetail with action points which feature in the white papers and reports referred to above.

We anticipate various positive developments in enabling greater access to the digital economy as a result of the combined focus of various regulators due to this paper and the above-mentioned papers and reports. For instance, the focus on technology-neutral regulation is likely to reduce barriers to entry in the tech space, and settlement agreements concluded between the Competition Commission and mobile network providers will reduce data costs.

We further anticipate closer scrutiny of tech related transactions by competition authorities.

10 PROPOSED FRANCHISING CODE PUBLISHED

The Department of Trade, Industry and Competition published a discussion document on a proposed code for the franchising sector to regulate behaviour in the industry and outline an alternative dispute resolution process between franchisors and franchisees. Such a code is specifically contemplated in the Consumer Protection Act, 2008, which governs franchise agreements.

FRANCHISING AND BRAND PROTECTION

As unemployment rates continue to rise, franchising may become an attractive option for those with an entrepreneurial flair that can afford entry into the market. The proposed code offers protection to existing and potential franchisees, and franchisors will need to enhance their internal protocols to ensure compliance. Dispute resolution in relation to franchising matters will hopefully be quicker and more cost effective if the code takes effect in 2021.

Franchisers and organisations in general are reminded to take steps to protect their brands and ensure that their marketing strategies and materials comply with laws and regulations. [Read more.](#)

"Praised for its enviable ability to handle significant commercial matters in the IP space." - **Chambers Global**



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