

Globalization and South African Patent Law

Economic globalization refers to the increasing connectivity and interdependence of the world's markets and businesses as a result of the growing scale of cross-border trade of services, flow of international capital and wide spread of technologies. The fast globalization of the world's economies in recent years is largely based on the rapid development of science and technologies.

In light thereof, intellectual property rights have moved from an arcane area of legal analysis to the forefront of global economic policymaking. In reaction to this tide of change concurrent with economic development and intellectual property rights, South Africa has continuously improved its patent system, which paved the way for South Africa into the global economy.

This article outlines crucial historical developments with respect to the inherent characteristics of an invention in South Africa, i.e. the meaning of "invention" and "inventor" and shows how patent law has adapted in the light of economic globalization.

Until 1910 South Africa as an entity did not exist. Instead it was divided into four separate British colonies: the Cape of Good Hope, Natal, the Orange River Colony and the Transvaal. Nevertheless each colony had its own patent law.

The influence of British patent law is and was significant on South African patent law. The Cape Patents Act of 1860 adopted the British concept of an invention. The meaning of "invention" in this Act was the same as in the old English patent law and was limited to "a manner of new manufacture". An invention is a manner of manufacture when it has an industrial application. Manufacture connotes the making of something, it is, therefore,

implied that a process of manufacture is associated with a vendible product. As will be seen from the definition of "invention" to follow, this meaning is very narrow in scope.

The Cape Patents Act of 1860 also provided that patents be granted "to the first and true inventor of any invention". In England, before the commencement of the British Patent Act of 1977, the term "inventor", included a person who had imported an invention into England. Furthermore, a foreign inventor could communicate the invention (directly or indirectly) to some person in England and allow that person to make the application as the "inventor", by reason of having imported the invention from abroad. Thus the English concept of a communicatee i.e. a mere importer of an invention of a foreign country, is included in the definition "first and true inventor".

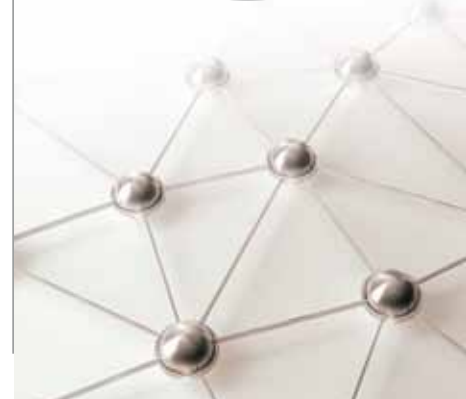
The first Natal Patents Act, Law 4 of 1870, closely followed the Cape Act. Similarly, the Natal Patents Act also adopted the British concept of an invention. The meaning of invention was again limited to "a manner of new manufacture".

Act 4 of 1870 also provides for patents to be granted to the "first and true inventor", i.e., "inventor" included "importer".

The first Patents Act promulgated in the South African Republic (ZAR) was Law 6 of 1887. This Act gave no definition of an invention but had the qualification that the invention had to be in the industrial field and must be capable of being exploited as an object of trade or industry. Law 6 of 1887 was replaced by Law 12 of 1897, which was in turn replaced by Law 10 of 1898.



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Although a number of changes were made, the meaning of "invention" remained unchanged. Law 10 of 1897 was replaced by the Patents Proclamation 22 of 1902. This Proclamation followed the USA and Canadian definitions of invention by listing the species "art, process, machine, manufacture or composition of matter". However, the definition still retained the proviso of usability or applicability in trade or industry.

The applicable portion from the Transvaal Proclamation of 1902 reads as follows:

"The expression 'invention' means any new and useful art, process, machine, manufacture, or composition of matter or any new and useful improvement thereof capable of being used or applied in trade or industry."

This is clearly wider than "a manner of new manufacture" but still excludes several classes on inventions.

Dealing with the meaning of "inventor", Law 6 of 1887 was used as a basis in the decision of *Hay v African Gold Recovery Co* (1896). In this case the judge is reported to have said:

"the words 'first and true inventor' are not to be taken in the artificial sense of the English Law, but in their natural sense. They are not to be limited to persons within the State; nor can inventor carry the meaning of 'importer. The 'first and true inventor' signifies that the person so described made the discovery himself, and that he did so before anyone else in any part of the world".

Thus even by 1896 the artificial meaning of inventor including communicators or importers of inventions was giving way to the more modern definition of inventor, as the actual creator on the invention only.

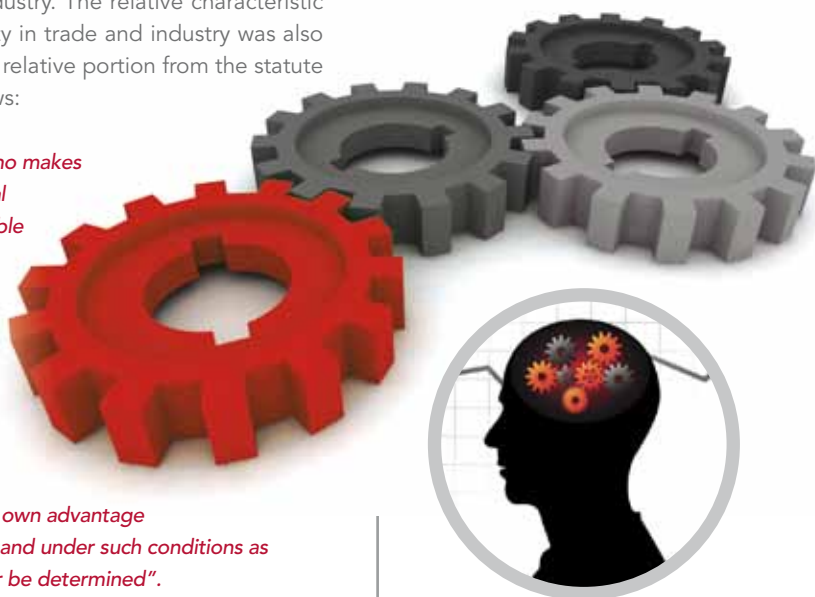
The patent statute that was promulgated in the Orange Free State gave no definition of

an invention but had the qualification that the invention had to be in the industrial field and must be capable of being exploited as an object of trade or industry. The relative characteristic of exploitability in trade and industry was also required. The relative portion from the statute reads as follows:

"Any person who makes a new industrial invention, capable of being exploited as a subject of trade or industry, shall have the exclusive right to exploit such invention to his own advantage for such a term and under such conditions as shall hereinafter be determined".

The statute also followed the ZAR Act 6 of 1887 regarding the meaning of inventor. After Union in 1910, the industrial property laws of the previously separate four colonies were consolidated and amended by the Patents, Designs, Trade Marks and Copyright Act 9 of 1916. This came into operation on 1 January 1917. This Act ignored the Cape and Natal approach and took over the definition of invention from the Transvaal Proclamation. Further, the Act was largely based on the British Patents Act of 1907. In s 6 it is stated expressly that "inventor" shall not include a person importing an invention from outside the Union. Communicatees were, therefore excluded.

In the years following In the years the promulgation of Act 9 of 1916, South Africa increasingly joined the global community and began to give greater significance to become more aware of the importance of intellectual property as way to help increase the value of exports.



As a result, South Africa acceded to the Paris Convention on 1 December 1947. This is regarded as one of the most important developments on the international front. As a result of this Convention, intellectual property rights of any contracting state are accessible to the nationals of other states, party to the Convention.

The Convention further provides that an applicant from one contracting state shall be able to use its first filing date as the effective filing date in another contracting State, provided that the applicant files another application within 12 months from the first filing, in the case of patent applications.

South Africa's accession to the Paris Convention was the first step in bringing in modern intellectual property legislation.

Act 9 of 1916, in so far as patents are concerned, was repealed and replaced by the Patents Act 37 of 1952. The Act came into operation on 1 January 1953. The definition of invention adopted in the 1952 Act is based substantially on the definition in Act 19 of 1916 but two differences of consequence were introduced. Firstly, the species art was broadened and the words "whether producing a physical effect or not" were inserted into the definition. Secondly the definition was broadened to include "plants". Thus, the definition of invention in the Act 37 of 1952 is as follows:

"Invention means subject to the provisions of this Act, any new and useful art (whether producing a physical effect or not), process, machine, manufacture or composition of matter which is not obvious, capable of being used or applied in trade or industry, and includes any distinct and new variety of plant, other than a tuberpropagated plant, which has been produced asexually, and any alleged invention."

It must be noted that Plant Breeders' Rights Act 22 of 1964 has deleted all references to plants in the Patents Act and provided a new "Plant Breeders Act". Thus again the definition of "invention" has widened.

In terms of section 1(vii) of Act 37 of 1952, 'inventor' was defined to include the legal representative of a deceased inventor or of an inventor who is a person under disability, but not including a communicatee.

The most recent revision of South African Patent law took place with the enactment of the 1978 Patents Act. The Act came into operation on 1 January 1979. Most of the provisions in the Act are largely based on the British Patent Act of 1977. The definition of patentable inventions is governed by Section 25 of the Act. Section 25 provides that:

"A patent may, subject to the provisions of this section, be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture."

There is no definition of what an 'invention' is, only certain exclusions such as discoveries, scientific theories, mathematical methods, aesthetic creations, computer programs, business methods, the presentation of information, an invention which encourages offensive or immoral behaviour and any variety of animal or plant not being a micro-biological process. Thus anything else is deemed to be an invention. This is evidently a much wider meaning of "invention" than that contained in the 1953 Act.

Although there is no corresponding definition of 'inventor' in the current Patents Act as was in the repealed Act of 1952, it is submitted that the current position is no different from what it was under the repealed Act.



December 31, 1999, was the deadline for all but the least-developed countries to comply with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) requirements of the WTO for extending and harmonizing Intellectual Property Rights. All WTO member countries are required to adopt national legislation and regulations to implement the rules prescribed by the TRIPS agreement. For the purposes of TRIPS, South Africa is deemed to be developed country, and accordingly had until 1 January 1996 to adopt the required legislation to comply with the TRIPS requirements. South Africa became a signatory to the TRIPS agreement on 1 January 1995.

South Africa became a contracting state of the PCT on March 16, 1999. Consequently, nationals and residents of South Africa are entitled to file international applications under the PCT on and after March 16, 1999, and from the same date it was possible to file international applications designating and electing South Africa.

Looking ahead, there are other treaties to which South Africa can contract, to further harmonize its patent laws with those of other countries of the world. The Patent Law Treaty (PLT) is a patent law multilateral treaty concluded on 1 June 2000 by 53 States and the European Patent Organisation. Its aim is to harmonize

formal procedures such as the requirements to obtain a filing date for a patent application, the form and content of a patent application and representation.

The PLT will make it easier for patent applicants and patent owners to obtain and maintain patents throughout the world by simplifying and, to a large degree, merging national and international formal requirements associated with patent applications and patents. In 2005 the number of contracting parties was 11 and by 2009 this increased to 20. South Africa is yet to become a signatory to the PLT.

By continuously revising the patent law and strengthening enforcement of that law, it is clear that South Africa has made great progress in putting in place a modern, transparent and effective patent system. It is expected that with future developments/reforms, the system will prove to be even more useful and beneficial.

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