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Connecting Africa's Potential

OWNING THE FUTURE

INTELLECTUAL PROPERTY IN SOUTH AFRICA 2024

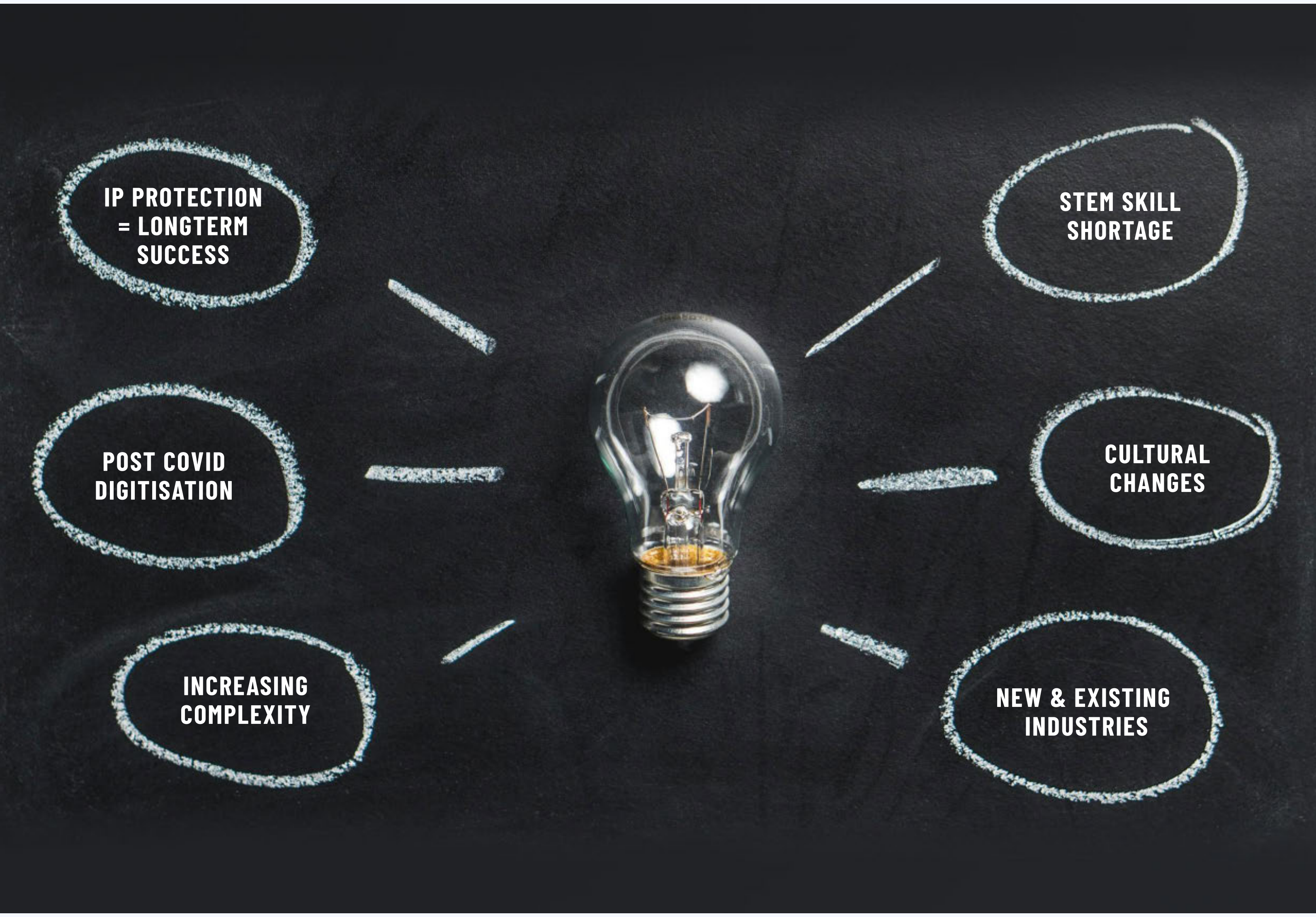
Table of Contents

Despite the benefits of IP protection in the context of long-term business success, business leaders are yet to fully prioritise this element as part of broader company strategies.

Intellectual Property (IP) and issues related to IP protection are rarely at the forefront of the debates surrounding the South African business landscape. This is unfortunate, as IP protection is well correlated with the long-term success of firms internationally, the IP space also acts as a useful barometer for the overall health of the national economy, highlighting both negative trends like overall structural downturns but also drawing attention to niches where companies are still bullish enough to invest money into Research and Development (R&D).

The development of this In On Africa (IOA) special report comes at a time of both local and global IP industry flux as the world economy re-aligns post the Covid-19 pandemic. Advances in generative AI, predictive algorithms, and the new digital products these have created, have led to corporates and their IP service providers engaging in a race to protect these intangible assets. The increasingly niche and technical nature of new designs and patents means that firms are increasingly competing with the STEM (Science, Technology, Engineering, and Medicine) fields for graduates and need to change their hiring practices to attract (and later retain) potential candidates. The blurred lines between IP firms' historical role as legal service providers and their newfound business advisory function means that firms are undergoing a pronounced shift in corporate culture, which has impacted their hiring, pricing, and marketing practices.

These international trends are accentuated in the South African market, where a low-growth economy and an influx of additional small entrants have served to promote a cutthroat competitive environment. Nevertheless, for those firms that can secure the necessary talent, capacity, and expertise to stand out above the mass of competing offerings, there are lucrative opportunities available, especially in consumer goods, intangible digital assets, and the technical innovations produced by the country's legacy industries.



This special report presents a selection of key findings that have been drawn from a wide range of research conducted by IOA in 2023 focusing on South Africa's IP landscape.*

1. The first pillar was consulting with open-source online research from a variety of available sources including news articles, industry reports and publications, information made available on law firms' websites, and their associated marketing material across a range of media platforms.

2. The second key pillar, and one which served to greatly augment the research, was further consultation with relevant representatives of legal entities operating in the market who focus on IP protection. Through this primary research component, we approached a wide selection of experts for input on the matter in covering a broad swathe of the market, from senior managers at the country’s top firms to more niche specialists at smaller firms and academic experts from major universities and research institutes. A summary of the key contributors and the topics discussed are further elaborated on below.

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KEY TOPICS DISCUSSED

CLIENT BEHAVIOUR AND SERVICES DEMAND

REGULATORY CHALLENGES

GROWTH TRAJECTORY OF THE IP INDUSTRY

SENTIMENTS SURROUNDING THE BROADER ECONOMY

FOCUS OF LEGAL SERVICES IN IP PROTECTION

KEY SECTORS DRIVING DEMAND FOR SERVICES

PRICING AND COSTING CONSIDERATIONS

SKILLS AND QUALIFICATIONS NEEDS FOR THE PRESENT AND FUTURE

MARKETING OF LEGAL SERVICES

ADVERTISING RESTRICTIONS

CONSIDERATIONS IN WORKING ACROSS JURISDICTIONS

THE IMPACT OF TECHNOLOGY AND AI ON THE ECONOMY

**For more information about IOA's research, please contact info@inonafrica.com*

IP protection is seldom spoken about as a key topic of conversation in the country's present economic environment. Interviews conducted with industry leaders paint IP protection as an afterthought. Only brought to the fore in times of crisis, e.g. occasions of severe infringement.

This lack of prioritisation of IP protection is unfortunate and can lead to more detrimental impacts over time. Decades of research have shown that some of the most valuable and long-lasting companies across various global stock exchanges owe their performance in good part to their unique offerings and the inimitable nature of inventions thereof (the iPhone is the easiest that comes to mind). South African companies, which are by no means unrepresented in terms of notable technological innovations, stand to benefit significantly from a more proactive approach to registering and protecting their IP.

At the time of writing, the South African economy is in a state of structural decline owing to various economic and political risks with which our readers are doubtlessly well acquainted. It is thus quite notable that despite a marked decline in the number of domestic patent and trademark filings, the overall IP space is still enjoying a bull run of new work in certain key market niches, particularly intangible digital assets.

This is further supported by the fact that the IP industry itself, despite being dominated by a few well-known firms, is experiencing an influx of activity and small firms offering diversified services in tapping into this segment of the market for additional litigation work.

These positive headwinds come with a host of challenges, however, which do require attention. The painfully slow nature of local courts and bureaucracy in general means that firms have to frequently negotiate with clients over pricing and long lead times on projects. The growing complexity of patents also means that firms are racing to secure candidates with a broader range of both technical and business skills to cater to service needs. These technological changes are also driving cultural changes in other ways including pushing firms to take a more active marketing approach which was not the case in the past.

Local

The level of domestic IP activity is directly tied to the performance of any given economy, and this holds true in the South African case as well. South Africa's trying economic situation means firms across various value chains are focusing on resilience and de-prioritising R&D spending with the result being a drawdown in the overall amount of new patent registrations. According to some interviewees, this process has been underway for some time, in line with the general decline in manufacturing as a share of the South African economy.

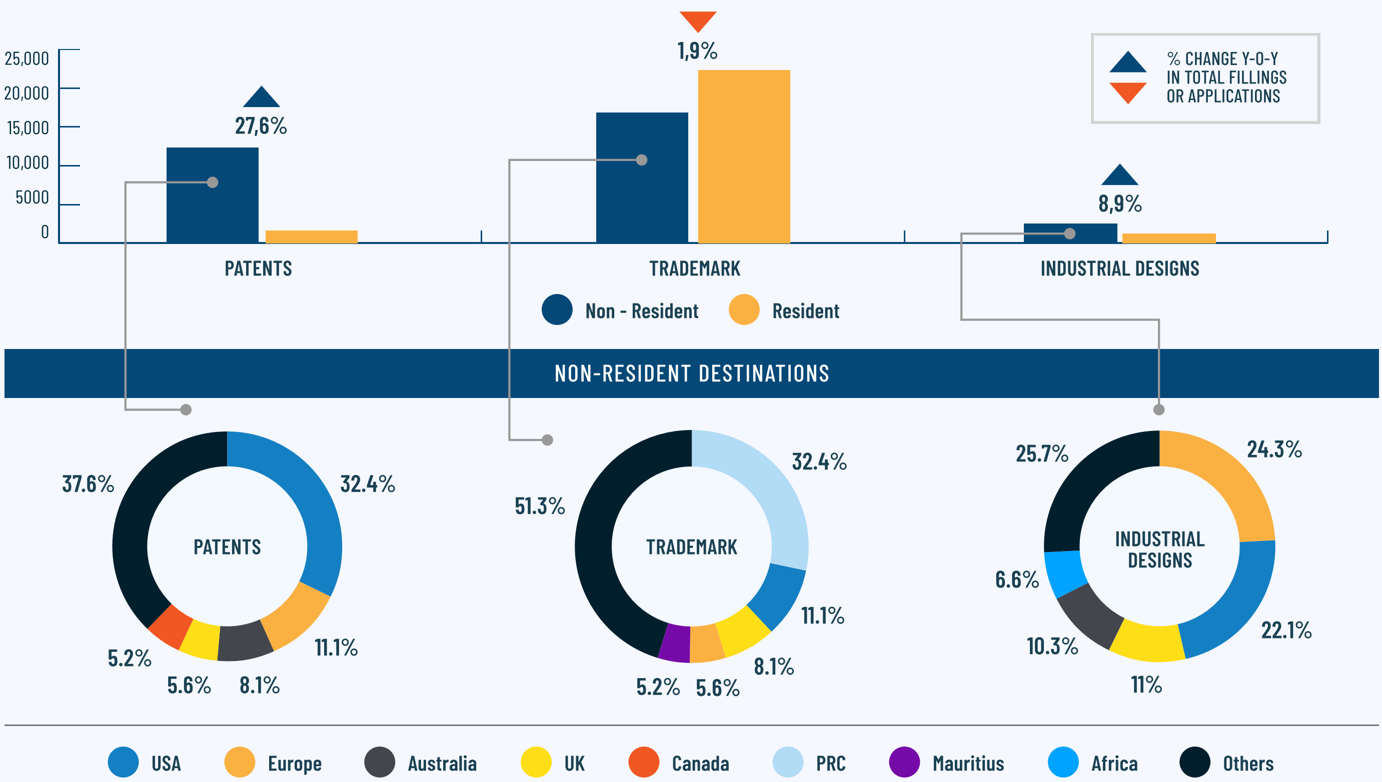
The remaining growth in domestic intellectual IP is a diverse mix. The core backbone comprises that IP growth which still emanates from the country's legacy industries – mining, manufacturing, petrochemicals, and pharmaceuticals. A growing portion of local growth is being taken up by more intangible products – particularly digital services that make use of algorithms, AI, and similar. Fintech products are another prescient example. Apart from existing firms, another key source of domestic IP growth have been local universities which have proven to be a useful launchpad for the commercialisation of new patents and designs. This has included the nascent local hydrogen fuel cell industry, something which interviewed respondents have credited to significant government policy support.

Foreign

South Africa is chiefly a technological importer, which means that foreign trademark and patent applications tend to far outweigh those arising internally (by some counts as much as 15 to 1 according to consulted experts). This has resultantly led to the local registration and legal defence of foreign IP as the industry's key lifeline. Though South Africa's growth has been muted in recent years, the country is still seen as a key staging ground for expansion into Africa. This has attracted numerous foreign firms to register their IP domestically even if they are not particularly active in the local market.

The biggest example is China, which has become the point of origin for an ever-increasing amount of IP filings in more recent years according to interviewed experts. Subsequent research by IOA showed that this was likely due to Chinese government policy, which grants subsidies to firms who register IP abroad, magnified by Chinese "white label" companies who will repeatedly switch between brand names to avoid legal problems in developed markets. South African companies will also frequently conduct R&D abroad, even if they are locally headquartered, and outbound IP registration in other markets thus represents a significant proportion of local IP contracts as well.

SOUTH AFRICAN IP FILINGS OVER THE PAST TWO DECADES



Source: WIPO

Trademarks

A trademark refers to the protection of branding surrounding a product i.e. slogans, names, colours, and overall branding. This sub-segment of the industry has remained fairly robust throughout South Africa's economic downturn when compared to patents and the protection of new product designs. New legislation around how foods are packaged and marketed will have a great impact on this sub-segment in the near future. New food labelling regulation will outlaw the usage of cartoon characters on unhealthy foods, in line with similar moves by legislators in other English common law-influenced legal systems, including the United Kingdom (2018) and Canada (2023). These changes, along with new rules against plastic use, will necessitate a large-scale redesign of local packaging.

Patent Filing and Registration

Patents, as opposed to trademarks, refer to licenses granted by a governmental authority that allows the holder sole rights to a particular product design. This can hold true both for physical product designs (ie. a new type of fuel cell battery) or more intangible goods (e.g. custom-built algorithms used by a financial or insurance firm). Patent growth in terms of physical designs is generally down in South Africa, in tandem with the general drawdown in local R&D in the real economy, largely due to the failure of the government to properly incentivise innovation and a noted ignorance of the importance of IP among local startups. There are however some notable exceptions which include the intersection of digital, financial, and insurance products which have enjoyed a mini boom period according to interviewed respondents. Growing complexity in this domain is providing a constant need for legal support.

IP Related Litigation

When trademarks, patent designs or copyrights (for authored creative works) are under threat firms will approach IP practitioners to litigate within the country's courts on their behalf. Numerous factors are contributing to an active litigation space in the country including a general lack of awareness and expertise in IP within businesses (including corporates), which in turn has contributed to IP violations without awareness. In addition, bureaucratic hurdles at the local patent registration office in Pretoria/Tshwane mean that patents and designs are often not "substantively examined" and granted applications under questionable criteria, which ultimately leads to litigation further down the line. For these reasons, litigation is an important core of IP-related services offered by legal firms in this space.

Delegates at the High-Level Conference on Respect for Intellectual Property Held in Sandton, South Africa in October 2018. This event underlines the importance of SA as a leading IP market on the African continent.

Image Courtesy: *Flickr/ World Intellectual Property Organization*

Skills Shortages and Attracting Talent

The overall trajectory within the IP industry has tilted ever more to the protection of increasingly complex patents, designs, and trademarks which are oftentimes complex and protected without detailed subject matter expertise in that field providing input. IP registrations and litigation will require experts or teams of experts from various disciplines to weigh in on whether infringements have occurred or not on the regular. With the increasingly technical nature of new IP, firms in this space are thus compelled to compete with the broader economy for new STEM graduates, who must be incentivised to complete further legal training in IP.

Changes In Pricing Models

Growing "corporatisation" has also influenced IP firm's pricing models. As legal service providers, IP firms prefer to charge hourly "rates" and can provide no clear price cap owing to the uncertainty inherent in litigation for example. This is often a pain point for price-sensitive clients who would prefer clearly defined, fixed up-front costs. Tensions of this kind are a particular problem with foreign clients who are unacquainted with the long lead times in dealing with the South African court system. Presently, IP firms strike a compromise, calculating custom fees with a mix of fixed rates (for registration and other straightforward administrative tasks) and providing more larger, open-ended estimates for litigation. Interviewed respondents predict that striking a balance between the needs of clients and the realities of litigation will be the main challenge in the future.

Slow Bureaucracy Hinders Business

The overall success of the legal profession ultimately comes down to the rapid completion of administrative tasks and securing favourable court decisions. This naturally poses challenges in the local environment, where both the patent registration office and the judicial system are well-known for their slow lead times on feedback and decision-making. This poses a challenge, especially in an environment where clients are primarily from abroad and used to more efficient bureaucracies in developed markets. Problems such as these compound when one considers how such long lead times can lead to ballooning costs as litigation is dragged out. Recent efforts to digitise patent registration could help address these issues, however.

Changes in Marketing Culture

This shift towards digitisation is also apparent within firms themselves, especially in terms of how they market their services in addressing needs. In the Anglophone world, it has traditionally been frowned upon to market oneself too heavily if at all. IP firms like their other counterparts have resultantly preferred to source work by word of mouth and from within their networks. Amid the advent of social media, however, the popularisation of "insights" publishing from a variety of consulting companies and the ongoing influx of new market entrants in the IP space, has initiated change with firms increasingly relying on less passive marketing strategies, including regular publishing schedules and media appearances.

The Patent Registration Office in Pretoria. Slow and dysfunctional bureaucracy is a key pain point in the IP space, and can often cause rifts between local firms and their foreign clients.

Image Courtesy: *Google Maps*

AI, Software and Analytics

The advances in computing and its derivatives like AI over the last decade have led to a rise in the creation of new digital products and tools which utilise data on a large scale. With foundational elements like Large Language Models or LLMs and algorithms freely available, companies are under enormous pressure to safeguard their innovations for fear of duplication. The growing complexity of these products places the onus on firms to rapidly tailor their skillsets toward software engineering and analytics in order to remain relevant.

Digital Products

Mobile money supplanting the traditional brick-and-mortar banking system has demonstrated the potential of the local market as a fully digitized market. Fintech and insuretech products accessible via mobile advances in AI and related tools have only expanded these possibilities. In terms of mobile money, South Africa has all but caught up with the East African market and the coming years are likely to see a continuous expansion in fully digital product offerings across a broad swathe of industry categories. Strict local regulations mean that products are unlikely to differentiate too much, adding an extra layer of complexity to IP protection.

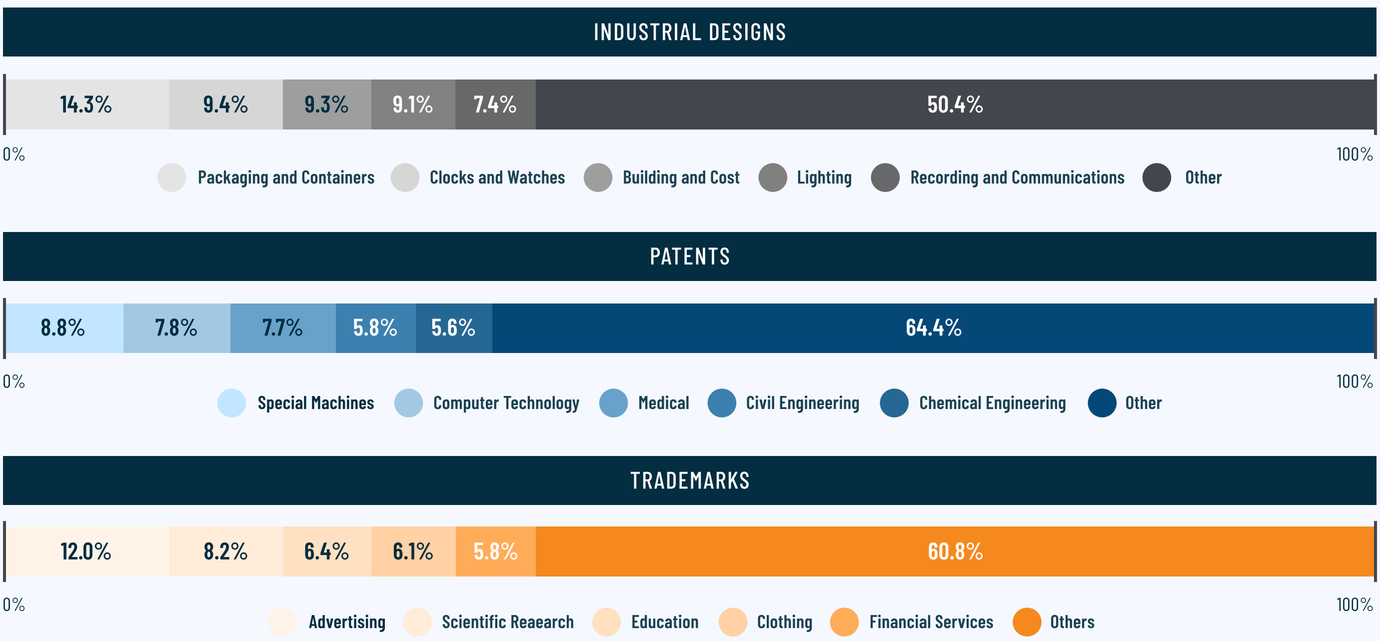
Retail, Luxury Goods and FMCG

Amid the various challenges faced by the South African economy, the local retail sector has stood out as a model of resilience, expanding its footprint and trailblazing advancements in the e-commerce domain despite the oscillating nature of the country's increasingly pressured consumers. This industry remains one of the key sources of Foreign Direct Investment which has resulted in a steady stream of new product offerings, all of which require IP protection. A second key factor is new advertising rules and packaging regulations in the sector, which will likely require a period of intensified IP activity going forward to ensure adherence.

Technical Innovations

Though the South African manufacturing sector has declined from its 20th century peak it remains well diversified, with what industry still exists enhancing its international competitiveness through specialisation in increasingly niche applications. These include SASOL's continued innovations in coal liquefaction technology, the recent successes in the South African pharma and biotech industry, local drone manufacturing, and most notably, the country's nascent hydrogen fuel cell industry, which will play a key role in diversifying the energy mix away from coal and which has received significant support through the government and its partnerships with universities.

% IP FILINGS BY THEME 2022



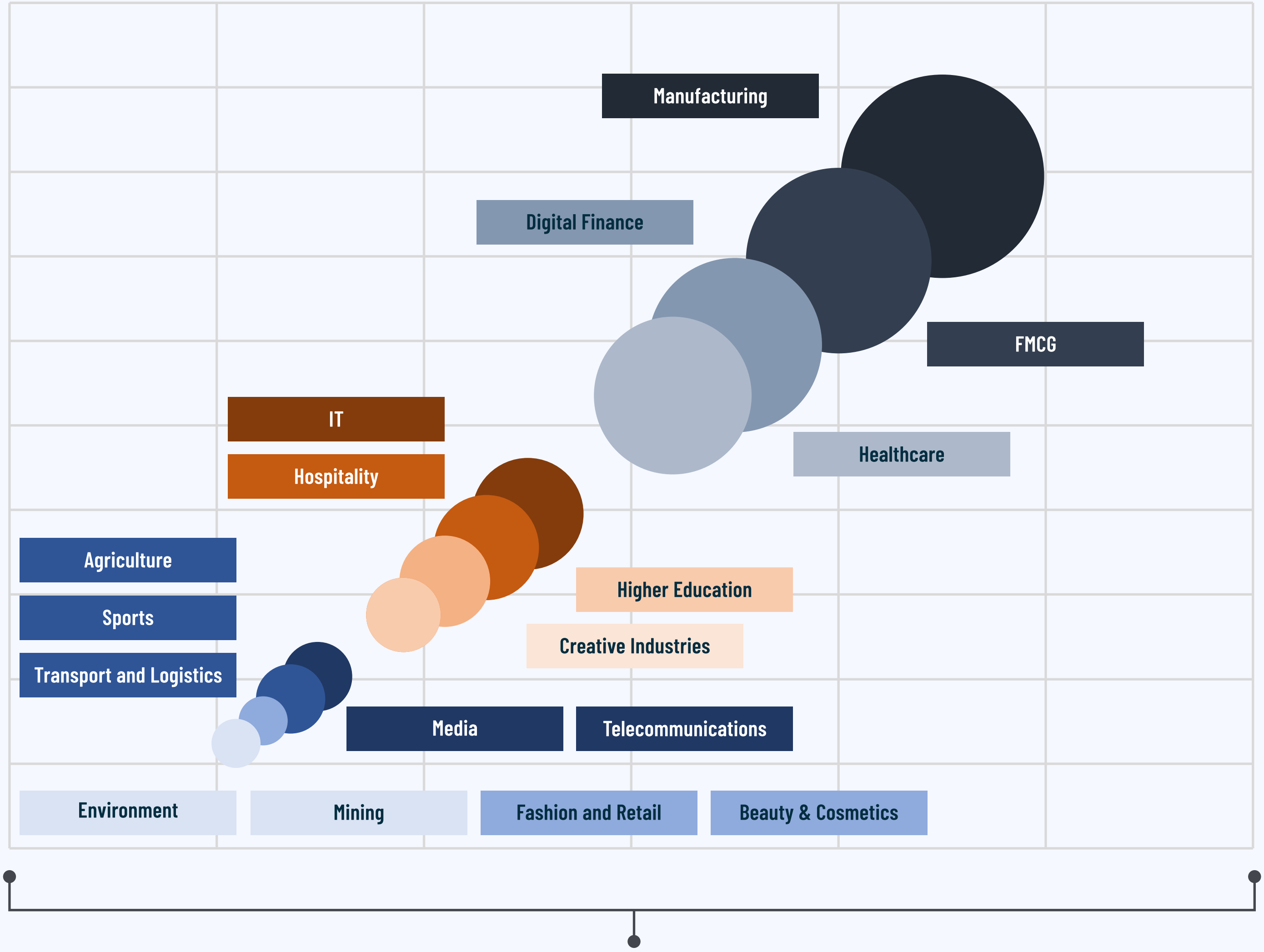
Source: *WIPO*

CONCLUSION

The South African IP landscape is a competitive one, beset by numerous systemic challenges and buffeted by a host of changing industry circumstances. Once a purely legal subindustry, the IP space is being increasingly corporatised, requiring firms to develop more commercial and technical skill sets, improve their business acumen, change their pricing models and modernise their approach to marketing.

Despite a pronounced draw down in local economic growth the sector still provides significant opportunities. Digital products and their downstream innovations in fintech, insuretech and other "techs", retail, and various niche technical industries are all primed for development to those firms who can properly differentiate themselves in a crowding environment

ECONOMIC SECTORS OF IP DEMAND RANKED THROUGH CONSOLIDATED ONLINE AND PRIMARY FEEDBACK



RELATED KEY CASE AREAS

- Trademark Portfolio Management
- Trademark Registration and Infringement
- Patent Infringement support
- Trademark advisory for M&As
- Domain name registration and Infringements
- Copyright Registration and Infringements

IOA was established in South Africa in 2007 with the goal of becoming the definitive source of expert research and analysis in Africa, focused on Africa. We are a team of more than 300 expert analysts, academics, researchers, social scientists, strategists, statisticians and editors who share their tremendous passion for all things African.

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Along our journey, our mission has always been to contribute in as many ways as possible to "connecting Africa's potential" and to the continuing rise of the African continent. Our envisioned destination is to see the African continent realising growth and opportunity for its people, and thriving as a hub for innovation and development across all sectors. We believe that this can only be achieved through smart collaboration and well-informed decision-making.

Our team, coupled with our wealth of knowledge on and experience in Africa-related research and analysis, distinguish us as leaders in Africa-focused intelligence. We are driven by the mission of guiding clients through data-driven decision-making in accelerating development in Africa. Our moto encapsulates the need to connect quality research and analysis with guided and informed decision-making in facilitating development on the continent.

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This publication was developed with data and insights drawn from IOA research conducted on South Africa's intellectual property landscape in 2023. For more information about this or other IOA research, please get in touch with us through the contact details listed below.

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