

DEPARTMENT OF TRADE AND INDUSTRY PATENT EXAMINATION BOARD

EXAMINATION 2022

Group 1 Subject (a)

Legal Framework for the Protection of Intellectual Property in South Africa

Examiners: A. van der Merwe, D. Cochrane, P. Sibisi, D. Biagio

Moderator: L. van der Walt

Time: 4 hours

Marks: 100

Instructions:

1. Answer all four questions.
2. Please note that the four questions carry equal mark values; accordingly, equal time should be devoted to the questions.
3. The term "TRIPS Agreement" or "TRIPS" refers to the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (WTO).

QUESTION 1: TRADE MARKS ACT, NO. 194 OF 1993 (the “Act”)

Answer ALL questions

QUESTION 1.1

Section 9(1) of the Act provides the fundamental function that a trade mark must be capable of performing for it to be registrable. What is that function? **(2)**

How does section 9(2) qualify that function? **(2)**

(Total 4)

QUESTION 1.2

In terms of the Act, it is generally not possible for two different entities to register an identical or confusingly similar trade mark in respect of the same or similar goods or services. Assuming the aforementioned is correct, as a general rule, is there a major “exception” provided in the Act to this rule? Explain your answer briefly. **(4)**

QUESTION 1.3

How does the Act define a “device”? **(4)**

QUESTION 1.4

In the infringement sub-sections 34(1)(a) and 34(1)(b) of the Act what is the difference between these two sub-sections in respect of the goods or services of the relevant trade mark registration, on the one hand, and the alleged infringing goods or services, on the other hand? **(4)**

QUESTION 1.5

In terms of section 62 of the Act when is it permissible for the letter “R” (or “Reg/d”) to be used in respect of a trade mark? And when can the letters “TM” be used? **(2)**

What are the consequences if the letter “R” is used wrongly? **(3)**

(Total 5)

QUESTION 1.6

What does the highly important section 10 of the Act provide basically in respect of - a) trade mark applications; and - b) trade mark registrations? **(4)**

TOTAL MARKS 25

QUESTION 2: COPYRIGHT ACT, NO. 98 OF 1978 (the “Act”)

- 2.1 Copyright in a computer program vests the exclusive right to do or to authorize the doing of a number of acts in the Republic. Name four. (4)
- 2.2 What is the definition of “published edition” in terms of the Act? (2)
- 2.3 Authorship plays an important role in copyright law. In terms of the Act, who is the author of the following works;
- 2.3.1 cinematograph film;
 - 2.3.2 musical work;
 - 2.3.3 photograph;
 - 2.3.4 published edition;
 - 2.3.5 programme-carrying signal (5)
- 2.4 What is the definition of “signal” in terms of the Act? (2)
- 2.5 Copyright in literary or musical works vests certain exclusive rights in the author. Name 4 (four). (4)
- 2.6 In terms of the Act, what is the term of copyright in respect of the following works:
- 2.6.1 sound recording;
 - 2.6.2 literary work;
 - 2.6.3 artistic work;
 - 2.6.4 published edition;
 - 2.6.5 cinematograph film. (5)
- 2.7 Under what circumstances will a work not be eligible for copyright protection? (3)

Marks [25]

QUESTION 3: PLANT BREEDERS' RIGHTS ACT, NO. 15 OF 1976 (the "Act")

1. Your client, Mr Dlamini, is a plant breeder. His speciality is grape vines. He has bred a variety of grape that he is very excited about, and meets with you to discuss whether he can apply for plant breeders' rights for this variety. The variety is distinct from other varieties that are common knowledge, and is uniform and stable. His first sales of the variety in South Africa were in Stellenbosch on 25 August 2021. He has also sold plants to a company in Australia on 20 April 2021, and that company is growing the vines in Australia. With reference to the relevant section of the South African Plant Breeders' Right Act, and quoting the section of the Act, advise Mr Dlamini as to whether he may apply for a Plant Breeders' Right in South Africa, and if so what the deadline is.

(10)

2. Assuming Mr Dlamini is able to proceed with a Plant Breeders' Right Application in South Africa, and he wishes to file the application in his own name, what will he need to submit and make available to the Plant Breeders' Rights office in support of the application?

(4)

3. Mr Dlamini has called his variety "red pearl" and will use this name as the denomination if he decides to file a Plant Breeders' Right application. Advise Mr Dlamini whether he may use "red pearl" as the trade mark for the variety.

(2)

4. What is the duration of a Plant Breeders' Right in South Africa?

(3)

5. What is the time limit for a third party to oppose a Plant Breeders' Right application?

(2)

6. Name four acts of infringement of a granted Plant Breeders' Right, in terms of Sections 23 and 23A of the Plant Breeders' Rights Act.

(4)

Marks [25]

QUESTION 4: INTERNATIONAL AGREEMENTS, CONVENTIONS AND TREATIES

- 4.1 Name three international treaties/conventions pertaining to intellectual property, to which **South Africa has not yet acceded and has not implemented.** (3)
- 4.2 Name three international treaties/conventions pertaining to intellectual property, to which **South Africa has not yet acceded but has implemented.** (3)
- 4.3 Indicate whether the following statements are true or false. If the statement is false, indicate why it is false:
- (a) General Agreement on Tariffs and Trade (GATT) was the precursor to the creation of the World Trade Organisation (WTO)
 - (b) The World Trade Organisation (WTO) is a United Nations organisation
 - (c) TRIPS requires that a person be able to obtain trade mark protection in a member state, for a particular fragrance or smell.
 - (d) Prior to the Copyright Amendment Act 125 of 1992, computer programs were protected as a literary work eligible for copyright.
 - (e) The DOHA Declaration is a declaration that nothing in the TRIPS Agreement is to be used to address the issue of exhaustion of IP rights for purposes of dispute settlement.
 - (f) TRIPS requires that member countries comply with certain articles of the 1971 Text of the Berne Convention, with the exception of the so-called moral rights provisions.
 - (g) The Hague Agreement relates to the protection of performers rights, phonograms (or sound recordings) and broadcasts.
 - (h) TRIPS leaves it up to the individual member countries to decide whether to provide for the protection of integrated circuits (IC's). (8)
- 4.4 Provide 3 main objectives of the TRIPS Agreement (3)
- 4.5 Patent filing statistics often show a correspondence between an increase in the number of patent applications filed in a country and improved economic growth in that country.

Explain what is meant by the “two-way interactive cycle” between these two factors. (2)

- 4.6 Article 30 of TRIPS provides that members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Explain the circumstances in which the so-called Bolar provision in our Patents Act (s69(A)), restricts the rights of a patentee in this way. (2)

- 4.7 How does the TRIPS provision on the protection of well known marks go beyond the provisions of the Paris Convention? (2)

- 4.8 Article 19 of TRIPS provides that if use is required to maintain a trade mark registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trade mark owner.

Does our legislation comply with this provision? Does our legislation go above and beyond this provision? Explain your answer. (2)

Marks [25]