

PATENT EXAMINATION BOARD

**LEGAL FRAMEWORK FOR THE PROTECTION OF INTELLECTUAL PROPERTY
IN SOUTH AFRICA– GROUP 1(a)**

June 2023

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Time: 4 hours

Total marks: 100

This paper consists of 7 pages (including this cover page)

Instructions:

- Answer all four questions.
- Please note that the four questions carry equal mark values; accordingly, equal time should be devoted to the questions.
- 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 194 OF 1993 ("THE ACT")

- 1.1 How is "mark" defined in the Act? (5)
- 1.2 What essential "function" does section 9(1) of the Act require that a trade mark must have to be registrable? And how does section 9(2) of the Act qualify that "function"? (4)
- 1.3 Section 10 of the Act importantly lists various categories of marks. Assuming that a particular mark falls within the wording of one of these categories, what is the effect of this section when that mark is the subject of (a) a trade mark application; and (b) a trade mark registration? (4)
- 1.4 Section 14 of the Act provides an "exception" to the general rule that a later-filed trade mark application for an identical trade mark and for the same goods or services, relative to an earlier trade mark registration, cannot be registered. What is this "exception" called, and briefly how could the applicant prove this to the Registrar? (4)
- 1.5 In the infringement section 34(1)(a), (b) and (c) of the Act, what do these three subsections require in respect of the respective infringing goods or services? (4)
- 1.6 In terms of section 34(3) of the Act what relief may the High Court grant in the event it has found in litigation that a trade mark registration has been infringed? (4)

[25]

QUESTION 2 - COPYRIGHT ACT 98 OF 1978 (“THE ACT”)

- 2.1 True or False: South African copyright system of exceptions and limitations is based on the US-style open-ended system known as "Fair Use." (2)
- 2.2 Name all nine works which are protected under our Copyright Act of 1978. (9)
- 2.3 Name three exceptions to the general principle that ownership vests in the Author of the copyright. (3)
- 2.4 What is the definition of "signal" in terms of the Act? (2)
- 2.5 Copyright gives the author of a music composition certain exclusive rights. Name 5 (five). (5)
- 2.6 Name four copyright works with a term of fifty (50) years. (4)

[25]

QUESTION 3 - PLANT BREEDERS' RIGHTS ACT 15 OF 1976

- 3.1 Name the alternative forms of protection that Article 27(3)(b) of the TRIPS Agreement says that Member countries must provide for the protection of plant varieties. (2)
- 3.2 Name the five requirements for applying for a Plant Breeders' right for a variety of plant in South Africa, provided for in terms of Section 2 of the South African Plant Breeders' Rights Act 15 of 1976. (5)
- 3.3 What is the duration of a Plant Breeders' Right in terms of Section 21 of the Plant Breeders' Rights Act 15 of 1976? (3)
- 3.4 List five of the six acts that others are prohibited from performing without a licence in respect of a Plant Breeders' Right, in terms of Section 23 of the Plant Breeders' Rights Act 15 of 1976. (5)
- 3.5 The South African Plant Breeders' Rights Act No. 12 of 2018 ("the new Act") was assented to on 27 March 2019 and published in the South African Government Gazette on 29 March 2019. Although the new Act has been assented to, it is not yet in force. List five (5) changes that the new Act will bring to Plant Breeders' Rights in South Africa. (10)

[25]

QUESTION 4: INTERNATIONAL AGREEMENTS, CONVENTIONS AND TREATIES

4.1 Except for enforcing a monopoly by preventing others from making, using, exercising, disposing of, offering to dispose of and importing, a patented invention into the territory, describe 3 other ways in which a patentee can derive benefit from a patent.

(3)

4.2 Over the last few decades, it has become increasingly common for patent infringement suits to be instituted by non-practising entities. Briefly explain two possible reasons for this.

(2)

4.3 Choose the most correct answer from the options provided:

1. South African has acceded to:
 - A. The Harare Protocol, for membership of the African Regional Intellectual Property Organisation (ARIPO)
 - B. The Hague Agreement
 - C. The Budapest Treaty
 - D. Locarno Agreement

2. South Africa has not acceded but has implemented:
 - A. The Strasbourg Agreement
 - B. The Patent Cooperation Treaty
 - C. The Bangui Agreement, for membership of the Organisation Africaine de la Propriété Intellectuelle (OAPI)
 - D. The TRIPS Agreement

3. South Africa has not acceded to, and has not implemented:
 - A. The Paris Convention
 - B. The Madrid Protocol
 - C. The Nice Agreement
 - D. The Berne Convention

4. Which international agency is responsible for the administration of TRIPS?
 - A. World Intellectual Property Organisation (WIPO)
 - B. World Trade Organisation (WTO)
 - C. The agency responsible for the administration of the General Agreement on Tariffs and Trade (GATT)
 - D. The Paris Convention

5. The agreement/treaty concerning the international registration of industrial designs is:
- A. The Strasbourg Agreement
 - B. The Locarno Agreement
 - C. The Washington Treaty
 - D. The Hague Agreement
6. Which of these is not a main objective of TRIPS?
- A. to ensure uniform levels of protection and enforcement of intellectual property rights in member countries
 - B. to promote innovation
 - C. to ensure that countries adopt measures necessary to protect public health
 - D. to prevent abuse of IP rights
7. Indicate True/False.
A country cannot be a member of TRIPS if it is not a member of the Paris Convention.
- A. True
 - B. False
8. A so-called "Bolar provision" is aimed at ensuring:
- A. That well known marks are protected
 - B. That an invention may be used by a person other than the patentee, for the purposes of obtaining and submitting information required by a regulatory authority for the registration of a medicament
 - C. That an invention may be used by a person other than the patentee, for research and development purposes
 - D. That copyright is not infringed by *fair dealing*, such as use for private study or reporting of current events
9. Indicate which one of the following statements is **false**.
The Doha Declaration stipulates that each member state has the freedom to:
- A. Determine which non-commercial activities will constitute patent infringement
 - B. determine the grounds upon which compulsory licences may be granted
 - C. determine what constitutes a national public health emergency
 - D. establish either an international/territorial regime of exhaustion of intellectual property rights

10. Indicate True/False.

In our law, integrated circuit topographies are afforded protection as a species of aesthetic design.

A. True

B. False

(10)

4.4 Explain the principles of “National Treatment” and “Most-Favoured-Nation Treatment” as set out in Articles 3 and 4 of TRIPS.

(2)

4.5 (a) Explain the difference between international and territorial exhaustion of a patentee’s rights.

(2)

(b) Explain the provisions of the TRIPS Agreement regarding the ability of a patentee to prevent the importation of a patented article.

(1)

4.6 Member countries of the TRIPS Agreement are required to provide protection for geographical indications, by affording interested parties the right to prevent the use of geographical indications of origin which would mislead the public, or which would constitute unfair competition.

Explain what is meant by a geographical indicator and how this is different from a generic description of the region of origin of goods.

(2)

4.7 TRIPS Agreement prescribes a list of substantive terms for compulsory licences and procedural requirements to be met before a compulsory licence will be granted (Article 31). List 3 of these.

(3)

[25]