

DEPARTMENT OF TRADE AND INDUSTRY PATENT EXAMINATION BOARD

EXAMINATION 2020

Group 1 Subject (a)

Legal Framework for the Protection of Intellectual Property in South Africa

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Moderator: S. Clelland

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”)

QUESTION 1.1

How is “mark” defined in the Act?

(5)

QUESTION 1.2

What is the fundamental requirement for registration of a trade mark as set out in the Act (ie in section 9)?

Does this section further explain or elaborate on this requirement?

(5)

QUESTION 1.3

Section 10 is a very important section of the Act. In your own words, what does this section regulate or provide overall in respect of (i) marks intended for registration; and (ii) marks already registered?

(3)

QUESTION 1.4

In terms of the Act, it is generally not possible for two identical or confusingly similar trade marks to be registered in respect of the same goods or services. Is this statement correct, as a general rule, and is there any “exception” to this general rule?

(5)

QUESTION 1.5

In the infringement sub-sections [34(1)(a) and (b)], what is the difference between these two sections in respect of the goods or services of the trade mark registration, on the one hand, and the “infringing” goods or services, on the other hand?

(2)

QUESTION 1.6

In terms of the Act, when is it permissible for a trade mark to be referred to by using the letter “R” (-meaning “Registered”) - and when can a trade mark be referred to by using the letters “TM”?

Is it a serious breach of the Act if the letter “R” is used incorrectly?

(5)

Marks [25]

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

- 2.1 Name four examples of an artistic work. (8)
- 2.2 What is excluded in the definition of musical work? (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 photographs;
- 2.3.2 published editions? (4)
- 2.4 In terms of the Copyright Act, “Publication” shall not include certain categories of works. Name three (3). (6)
- 2.5 Is the State bound by the Copyright Act? (2)
- 2.6 The Copyright Act grants certain exclusive rights to the author of a literary or musical work. Name three. (3)

Marks [25]

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

1. Name the four basic requirements for obtaining a Plant Breeders' Right, and provide a short explanation for each. **(10)**

2. Who is entitled to apply for a Plant Breeders' Right? **(2)**

3. What is the difference between a denomination and a trade mark for a variety? **(3)**

4. Mr Smith is a farmer who owns a 1 hectare small holding in the Free State on which he grows corn. Company A has a valid South African Plant Breeders' Right for a variety of corn called Classic Gold. Mr Smith bought Classic Gold seeds in a legitimate manner from Company A and grew and harvested corn on his small holding. He consumes some of the corn that he harvests and sells some of it at a local market. He also saves some of the harvested corn and replants it on the same small holding the next year. With reference to the particular section of the South African Plant Breeders' Right Act, explain whether Mr Smith's act of saving and replanting seed infringes the Plant Breeder's Right covering the Classic Gold corn variety. **(5)**

5. What is the time limit for a third party to oppose a Plant Breeders' Right application? **(2)**

6. Is it possible to apply for the revocation of a Plant Breeders' Right? **(3)**

Marks [25]

QUESTION 4: INTERNATIONAL AGREEMENTS, CONVENTIONS AND TREATIES

4.1 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 to, 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 Rome 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 South African law, integrated circuit topographies are afforded protection as a species of functional design.

- A. True
- B. False

(10)

4.2 Historically intellectual property was seen as a tool for enforcing a monopoly. More recently, intellectual property is recognised as an asset. Aside from its ability to enforce a monopoly in the invention (i.e. prevent others from making, using, exercising, disposing of, offering to dispose of and importing, the invention), explain three other ways in which patents can be exploited.

(3)

4.3 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)

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

(2)

4.5 How does South African law on the registrability of a design applied to an article go beyond the provisions of the TRIPS agreement?

(2)

- 4.6 How does the TRIPS provision on the protection of well known marks go beyond the provisions of the Paris Convention? (2)
- 4.7 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 South African legislation comply with this provision? Explain your answer. (2)
- 4.8 Explain one instance where South African IP legislation is not expressly compliant with TRIPS. (2)

Marks [25]