

DEPARTMENT OF TRADE AND INDUSTRY PATENT EXAMINATION BOARD

SUPPLEMENTARY EXAMINATION 2022

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

Total marks: 100

This paper consists of 8 pages (including this cover page)

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”)

- 1.1 How does the Act define “trade mark”? (5)
- 1.2 Section 10 is one of the most important sections of the Act. What does this section provide in respect of marks and trade marks? (5)
- 1.3 Section 14 of the Act provides for “honest concurrent use” of a trade mark. What does this mean and what are the benefits of honest concurrent use. (5)
- 1.4 In the infringement section 34(1)(a) of the Act, what are the elements that a proprietor needs to prove before the High Court to establish infringement of its trade mark registration? (5)
- 1.5 In terms of section 34(3) of the Act what relief may be granted by the High Court in the event it has found that a trade mark registration has been infringed? (5)

[25 marks]

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

- 2.1 Copyright in a sound recording vests the exclusive right to do or to authorize the doing of a number of acts in the Republic. Name four. **(4)**
- 2.2 Provide 6 (six) examples of artistic works in terms of the Act. **(6)**
- 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? **(4)**
- 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)**

[25 marks]

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

- 3.1 Name the International Convention of Plant Breeders' Rights that South Africa is a member of, and to which agreement of this Convention South Africa is currently a signatory. **(2)**
- 3.2 One of the basic requirements for obtaining a Plant Breeders' right for a variety of plant in South Africa is that the variety is "new". Discuss the provisions of Section 2 of the South African Plant Breeders' Rights Act in respect of "new". **(4)**
- 3.3 The three other basic requirements for obtaining a Plant Breeders' right for a variety are that the variety is Distinct, Uniform and Stable. Provide a short explanation for each of these requirements. **(6)**
- 3.4 From an infringement point of view, name three of the effects of a Plant Breeders' Right in terms of Section 23 of the Plant Breeders' Rights Act. **(3)**
- 3.5 What needs to be submitted to the Registrar of Plant Breeders' Rights when lodging an application for a Plant Breeder's Right in South Africa? Assume that the breeder has assigned his/her rights in the variety to a successor in title. **(4)**
- 3.6 What is the duration of a Plant Breeder's Right in terms of Section 21 of the Plant Breeders' Rights Act? **(3)**
- 3.7 After a Plant Breeders' Right application is filed in South Africa, what is the deadline for making plant material to the Registrar available for testing purposes? **(1)**
- 3.8 What is the time-limit for a third party to oppose a Plant Breeders' Right application? **(2)**

[25 marks]

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 Choose the most correct answer from the options provided:

1. South Africa 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 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 our law, integrated circuit topographies are afforded protection as a species of functional design.
- A. True
 - B. False
- (10)**
- 4.3 Explain the principles of “National Treatment” and “Most-Favoured-Nation Treatment” as set out in Articles 3 and 4 of TRIPS. **(2)**
- 4.4 Explain why South African law does not comply with the TRIPS Agreement pertaining to the protection of undisclosed information during registration of pharmaceutical or agricultural products. **(2)**
- 4.5 Explain the provisions of the TRIPS Agreement regarding the effect of a patent as it pertains to the importation of a patented article. **(1)**
- 4.6 In some countries, methods of treatment of humans and animals are excluded from patentable subject matter and in other countries they are not. What is the position of TRIPS on this point? **(1)**
- 4.7 The Copyright Amendment Act no. 125 of 1992 established computer programs as a category of copyright work. How were computer programs protected before this amendment? **(1)**

- 4.8 TRIPS requires that member states afford protection to the layouts of integrated circuit topographies and mask works. How are these protected in terms of our law? (1)
- 4.9 Give an example of where a copyright infringement would also be a criminal offence. (1)
- 4.10 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 marks]