

DEPARTMENT OF TRADE AND INDUSTRY PATENT EXAMINATION BOARD

EXAMINATION 2017

Group 1 Subject (a)

Legal Framework for the Protection of Intellectual Property in South Africa

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

- 1.1 What, in terms of the Act, is the definition of:
a) “mark”; and
b) “trade mark”
(6)
- 1.2 What is the fundamental requirement in the Act for a trade mark to be registrable?
(4)
- 1.3 Is it possible, in terms of the Act, for two identical or similar trade marks to be registered for the same goods or services?
(4)
- 1.4 Section 34(1) of the Act deals with different kinds/scenarios of infringement of a trade mark registration. Please summarize briefly and in your own words what the essence of these different kinds/scenarios are in terms of the relevant goods or services. Do not repeat these sub-sections of the Act *verbatim* or summarize the full sub-sections.
(6)
- 1.5 Is it possible, in terms of the Act, for a registered trade mark to be hypothecated? If so, what document has to be lodged with the Registrar of Trade Marks?
(2)
- 1.6 What, in terms of the Act, is the position when a person makes a representation with respect to an unregistered trade mark, to the effect that it is registered, for example by using the letter R in a small circle next to the trade mark (i.e. the registered symbol)?
(3)

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? (3)
- 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 sound recording?
- 2.3.2 cinematograph films? (4)
- 2.4 In addition to artistic works, musical works, sound recordings and cinematograph films, name five (5) categories of works which are protected under the Copyright Act. (5)
- 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 cinematograph film. Name three. (3)

Marks [25]

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

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)

2. Name the five basic requirements, in terms of Section 2(1) of the Plant Breeders' Rights Act, for obtaining a Plant Breeder's Right.

(5)

3. Explain the provisions of Section 2(a) of the South African Plant Breeders' Rights Act in respect of the basic requirement that a variety must be "new".

(4)

4. 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)

5. What is the duration of a Plant Breeder's Right in terms of Section 21 of the Plant Breeders' Rights Act?

(3)

6. List three of the remedies that are available to the holder of a Plant Breeder's Right in South Africa that has been infringed.

(3)

7. Explain the exception to infringement provided for in terms of Section 23(6)(f) of the Plant Breeders' Rights Act, which is also known as "Farmers' Privilege".

(4)

Marks [25]

QUESTION 4: INTERNATIONAL AGREEMENTS, CONVENTIONS AND TREATIES

4.1 Aside from preventing others from making, using, exercising, disposing of, offering to dispose of and importing, a patented invention, list 4 other ways in which a patentee could derive benefit from their patent portfolio.

(2)

4.2 Indicate True/False to the following statements:

- a) Our copyright law complies substantially with the TRIPS requirements despite the fact that South Africa has not acceded to the Rome Convention, WIPO Copyright Treaty, WIPO PPT or Washington Treaty.
- b) TRIPS member states may require use for registration of a trade mark but use must not be a precondition for filing a trade mark application.
- c) TRIPS requires that member countries provide for the protection of integrated circuits (IC's). In our law IC's are protected by means of copyright and design legislation.
- d) South Africa has not yet acceded to the International Convention for the Protection of Industrial Property
- e) TRIPS member countries must give effect to the provisions of TRIPS and can, but are not obliged, to provide more extensive protection for intellectual property than is required by TRIPS.

(5)

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 Give an example of where South African legislation does not align with the provisions of the TRIPS agreement.

(1)

4.5 What is the position of the TRIPS Agreement on the issue of international, national and territorial exhaustion of rights?

(1)

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.

- a) 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 two ways in which our Patents Act restricts the rights of a patentee in this way.

(4)

- b) Explain how the restriction of a patentee's rights as provided in Article 30 of TRIPS aligns with the objectives of TRIPS as stated in Article 8.

(3)

4.8

- a) 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)

- b) Explain how this position promotes one of the main objectives of TRIPS.

(2)

- 4.9 The Doha Declaration confirmed that, while patentees have certain exclusive rights, member states are nevertheless entitled to protect public health. Briefly describe two ways in which member states can promote access to patented medicines for all.

(2)

Marks [25]