

**PATENT EXAMINATION BOARD**

**LEGAL FRAMEWORK FOR THE PROTECTION OF INTELLECTUAL PROPERTY  
GROUP 1(A)**

**June/July 2025**

Examiners: A. van der Merwe, A. Maré, D. Cochrane, D. Biagio,  
Moderator: S. Clelland

Time: 4 hours

Total marks: 100

This paper consists of 10 pages (including this cover page)

**Instructions:**

- Answer all questions
- Write legibly
- The term "TRIPS Agreement" or "TRIPS" refers to the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (WTO).

**Section 1: Trade Marks Act, No. 194 of 1993 (“the Act”)**

- 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.
- (a) What is that function? (2)
- (b) How does section 9(2) qualify that function? (2) **(4)**
- 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. What is the name of the exception to this rule and what is required from the applicant in order for the registrar to accept an application based on this rule? **(4)**
- 1.3 How does the Act define a “device”? **(4)**
- 1.4 What is the difference between the provisions of infringement sub-sections 34(1)(a) and 34(1)(b) of the Act in respect of the goods or services of the relevant trade mark registration, on the one hand, and alleged infringing goods or services, on the other hand? **(4)**
- 1.5 (a) In terms of section 62 of the Act, when is it permissible for the letter “R”, the symbol ® or “Reg/d” to be used in respect of a trade mark? (1)
- (b) When can the letters “TM” be used? (1)
- (c) What are the consequences if “R”, ® or “Reg/d” is used wrongly? (3) **(5)**
- 1.6 What are the general provisions in terms of section 10 of the Act in respect of:
- (a) trade mark applications; and (2)
- (b) trade mark registrations? (2) **(4)**

**[25]**

## **Section 2: Copyright Act, No. 98 of 1978 (“the Act”)**

- 2.1 Define “copyright”, differentiating between a positive and a negative definition. (2)
- 2.2 Set out four of the requirements for subsistence of copyright. (4)
- 2.3 For each of the following “works”, who is the “author” of the work:
- (a) a literary, musical or artistic work;
  - (b) a photograph;
  - (c) a broadcast;
  - (d) a published edition? (4)
- 2.4 Name two of the formalities for valid copyright transfer (assignment) under South African law. (2)
- 2.5 What are “moral rights”? (2)
- 2.6 List two of the remedies available under section 24 of the Act. (1)
- 2.7 Mr Botha has an idea for a new software product, but he is not a coder and has no technical or design skills beyond his idea. He pays Mr Singh R 20 000 to write the code and deliver the final product to him in a working order. Mr Singh spends two weeks working on the code at night on his own computer, while he is employed under a full-time employment agreement by CIVL Industries (Pty) Ltd as a civil engineer during the day. He takes no further instruction, direction or guidance from Mr Botha, who does not have the skills to provide such guidance. There is no written agreement between Mr Botha and Mr Singh – they work “on a handshake”.
- Mr Botha takes delivery of the code and pays Mr Singh the full R 20 000. The software product is a huge commercial success. Mr Botha now wants to sell the software product to an international software firm, 101X Software Limited (based in the United Kingdom).
- As part of the transaction between Mr Botha and 101X Software, Mr Botha needs to provide a warranty of copyright ownership in the software code.
- (a) What type of “work” are we dealing with? (1)

- (b) Who is the copyright owner of the work in the circumstances considering the copyright act and the “handshake agreement” between Mr Botha and Mr Singh, as well as the fact that it was Mr Botha’s idea and he paid for the deliverable in full? Explain, with reference to the Act and relevant case law. (6)
- (c) On the assumption that Mr Botha may not be the owner of the work, what steps can be put in place between the current owner and Mr Botha to satisfy the ownership condition under the proposed 101X Software transaction? (1)
- (d) How would your answer in (b) differ if Mr Botha had technical skills and provided ongoing guidance and detailed instructions to Mr Singh? Explain briefly. (2)

**(10)**

**[25]**

### **Section 3 – Plant Breeders’ Rights**

3.1 Mr A is an enthusiastic botanist, specialising in proteas. One day while hiking on Table Mountain, he found a protea plant with an unusually coloured flower. It was deep purple in colour. He took a photograph of the flower and when he was back at home, he searched his books and the Internet, and was surprised to learn that the flower was different in colour to all the other proteas he could find of the same variety. The next day he went back and took a cutting from the plant. Mr A grew a plant from the cutting and when it flowered, he was pleased to see that the flower still had the unusual deep purple colour. He then cross-pollinated the plant with other protea plants of the same variety until the plants that he bred all exhibited the same deep purple flower, and the plants maintained this colour flower after repeated propagation. A botanist friend who visited Mr A was impressed by the plants, and told him that the flowers would be very popular and he could make a lot of money selling them. On 4 April 2025, Mr A took some flowers to his local florist who immediately bought all of them. Mr A realised that the flowers would be popular and that it would be very easy for someone to make cuttings from the flowers that they bought and to grow and sell this new protea plant themselves. His friend suggested that Mr A apply for Plant Breeders’ Right (PBR) protection for his protea. Mr A comes to you for advice.

3.1.1 (a) With reference to section 2(2)(a) of the South African Plant Breeders’ Rights Act, No. 15 of 1976 (“the Act”), what are the deadlines for filing an application for a Plant Breeders’ Right in South Africa? (4)

(b) What is the deadline by which Mr A must file an application for a Plant Breeders’ Right for his protea variety? (give the date) (1)

**(5)**

3.1.2 (a) In terms of Section 6 of the Act, who can apply for a Plant Breeders’ Right? (3)

(b) Mr A found the protea with the deep purple flower in the wild. Explain whether Mr A is entitled to apply for a Plant Breeders’ Right for this protea variety. (1)

**(4)**

3.1.3 (a) With reference to Section 2(2)(b)-(d) of the Act, what are the so-called “DUS” requirements for a Plant Breeders’ Right to be granted? (3)

(b) Explain whether the variety complies with these requirements. (3)

**(6)**

- 3.1.4 Assuming Mr A is able to proceed with an application for a Plant Breeders' Right in South Africa, and he wishes to file the application, what documents and material will he need to submit and make available to the Plant Breeders' Rights office in support of the application? **(4)**
- 3.1.5 Mr A has called his variety "Deep Purple" and will use this name as the denomination if he decides to apply for a Plant Breeders' Right. Advise Mr A whether he may use "Deep Purple" as the trade mark for the variety. **(2)**
- 3.2 Name four acts of infringement of a granted Plant Breeders' Right, in terms of Sections 23 and 23A of the Act. **(4)**
- [25]**

#### **Section 4: International Agreements, Conventions and Treaties**

4.1 Choose the most correct answer from the options provided (1 mark each):

1. Which of these is a primary objective of the TRIPS Agreement?
  - A. To increase global IP filings
  - B. To promote cultural exchange through publication
  - C. To harmonize intellectual property laws
  - D. To ensure that the rights of inventors and creatives are protected
2. Which of the following forms of IP protection is not explicitly required to be made available by member states, under TRIPS?
  - A. Trade secrets
  - B. Utility models
  - C. Patents
  - D. Industrial designs
3. What does TRIPS stipulate regarding the doctrine of exhaustion of intellectual property rights?
  - A. That it is mandatory to follow an international exhaustion principle
  - B. That all member states must harmonize exhaustion laws
  - C. That issue relating to exhaustion of rights shall not be addressed under the TRIPS dispute settlement system
  - D. That exhaustion of rights issues must be handled through compulsory licensing provisions
4. According to TRIPS, which of the following must be available for patent protection in all member states?
  - A. Pharmaceutical compositions
  - B. Methods of human treatment
  - C. Computer programs
  - D. Plant varieties
5. What does the term "national treatment" mean in the context of TRIPS?
  - A. National governments must treat foreign patent applicants as investors into their state, for the purposes of trade
  - B. Member states must afford citizens of other member states rights that are no less favourable than those of its own citizens
  - C. National governments must apply IP laws uniformly amongst all the citizens of that nation
  - D. The IP rights of nationals in one member state can be enforced in the courts of any other member state

6. Under TRIPS, which of the following is **NOT** a requirement of a compulsory licence?
- A. The licence must be non-exclusive
  - B. It must provide adequate remuneration to the right holder
  - C. It must be subject to judicial review
  - D. It must be assignable to another party
7. What right does TRIPS require member states to provide, in relation to computer programs?
- A. Moral rights
  - B. Rental rights
  - C. Reverse engineering rights
  - D. Open-source licensing
8. What is the minimum term of protection for a copyright work under TRIPS when not based on the life of a natural person?
- A. 25 years
  - B. 50 years from the end of the calendar year of publication
  - C. 60 years from creation
  - D. 20 years from publication
9. Which principle of TRIPS mandates that advantages granted to nationals of one member state must be granted to all other member states?
- A. National treatment
  - B. Reciprocity principle
  - C. Harmonization clause
  - D. Most-favoured-nation treatment
10. What role does the Paris Convention play in the TRIPS Agreement?
- A. It is replaced by TRIPS entirely
  - B. It is ignored in favour of national laws
  - C. TRIPS incorporates key provisions of the Paris Convention and requires compliance with them
  - D. It is relevant only for non-WTO members
11. According to TRIPS, how must copyright protection apply to computer programs?
- A. Only if they are published
  - B. As artistic works
  - C. As literary works
  - D. Not at all, unless registered



12. How does TRIPS extend protection for well-known trade marks beyond the Paris Convention?
- A. It allows for protection even where the mark is unregistered
  - B. It does not require proof of actual confusion before action can be taken
  - C. It provides for protection even in relation to unrelated goods or services, where there is confusion
  - D. It mandates that the law permit the proprietor of a well known mark to claim punitive damages for infringement
13. Which of the following statements is most correct?
- A. IP is an intangible asset that may have value
  - B. Competition laws will not apply where IP rights are involved
  - C. IP licensing is critical in industry sectors based on products that can be reverse engineered
  - D. IP protection is particularly relevant to businesses that make physical products
14. Which of the following international agreements is not administered by the World Intellectual Property Organisation (WIPO)?
- A. The Berne Convention for the Protection of Literary and Artistic Works
  - B. The TRIPS Agreement
  - C. The Paris Convention for the Protection of Industrial Property
  - D. The Patent Cooperation Treaty (PCT)
15. 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

**(15)**

- 4.2 Why would a multinational group of companies establish a separate IP holding company to own the group's intellectual property? Give two reasons and briefly explain each.

**(2)**

4.3 Article 30 of TRIPS permits limited exceptions to be made to the rights conferred by a patent, taking into account the legitimate interests of third parties as well as the legitimate interests of the patent holder, by ensuring that the exceptions do not unreasonably conflict with the normal exploitation of the patent.

(a) Explain what a Bolar provision is. (2)

(b) Explain how the Bolar provision in South African patent law balances the interests of patent holders with public access to affordable medicines. (2)

(c) Is a person other than the patentee entitled to use the Bolar provision as a defence to patent infringement where it manufactures a product before the expiry of the patent but does not conclude any sales of the product before the expiry of the patent? (Explain your answer) (2)

**(6)**

4.4 Article 8.2 of TRIPS provides that member states may adopt provisions to prevent the abuse of IP rights by right holders.

Give an example of a provision in our law that is aimed at preventing such abuse (indicate the abuse it aims to prevent and how the provision prevents this abuse).

**(2)**

**[25]**