

PATENT EXAMINATION BOARD

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

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Examiners: A. van der Merwe, N. Sibisi, 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 How does the Act define a “device”? (4)
- 1.2 (a) In terms of section 9 of the Act what essential “function” must a trade mark have for it to be registrable in respect of certain goods (e.g. electronic goods)? (2)
- (b) Does section 9 of the Act qualify, or expand on, the function? (2)
- 1.3 What are the general provisions in terms of section 10 of the Act in respect of:
- (a) trade mark applications; and
- (b) trade mark registrations? (4)
- 1.4 Section 11 of the Act stipulates that a trade mark must be registered in respect of two essential requirements. What are these? (4)
- 1.5 How do the provisions of infringement sub-sections 34(1)(a) and 34(1)(b) of the Act differ in respect of the goods or services of the relevant trade mark registration, on the one hand, and any alleged infringing goods or services, on the other hand? (4)
- 1.6 (a) In terms of section 62 of the Act, when is it permissible for the symbol ®, letter “R” 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 ®, the letter “R” or “Reg/d” is used wrongly? (3)

[25]

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

- 2.1 Copyright in a computer program vests in the author the exclusive right to do, or to authorise the doing of several acts in the Republic. Name four of these rights. (4)
- 2.2 What is the definition of “artistic works” in terms of the Act? (3)
- 2.3 Authorship plays an important role in copyright law. In terms of the Act, who is the author of the following works
- 2.6.1 recorded sounds or data;
 - 2.6.2 works of architecture;
 - 2.6.3 computer software;
 - 2.6.4 books;
 - 2.6.5 television programmes? (5)
- 2.4 Must a non-exclusive license for use of copyright be in writing for it to be valid? (2)
- 2.5 Under what circumstances will the reconstruction of a work of architecture or the relevant drawings not infringe copyright when used without the author's or owner's consent? (3)
- 2.6 In terms of the Act, what is the term of copyright in respect of the following works:
- 2.3.1 computer programs;
 - 2.3.2 artistic works;
 - 2.3.3 photographs;
 - 2.3.4 published editions? (4)
- 2.7 Under what circumstances will a work not be eligible for copyright protection? (4)

[25]

Section 3 – Plant Breeders’ Rights (Plant Breeders’ Rights Act 15 of 1976 as amended (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 Act in respect of “new”. **(4)**
- 3.3 Name the three other basic requirements for obtaining a Plant Breeders’ right for a variety in terms of Section 2(2) of the Act. **(3)**
- 3.4 What is the difference between a denomination for a variety and a trade mark for a variety? Can they be the same? **(3)**
- 3.5 What is the duration of a Plant Breeder’s Right in terms of Section 21 of the Act? **(3)**
- 3.6 Section 10 of the New South African Plant Breeders’ Rights Act No. 12 of 2018 deals with the so-called “Farmers’ Privilege” exception:
- (a) Name the five categories of farmers provided for, for the purposes of Section 10(2)(a) in the Draft Regulation 6. **(5)**
- (b) In terms of Section 23(6)(f) of the Act, a farmer who obtains propagating material in a legitimate manner and grows plants from the seed on a piece of land is allowed to save seed from the plants and re-plant the farm-saved seed on that same piece of land. Explain a major difference from the current position of “farm-saved seed” provided for in Draft Regulation 6. **(2)**
- 3.7 Name a new penalty to the infringement of a Plant Breeders’ Right which will be introduced in terms of Section 55 of the New South African Plant Breeders’ Rights Act No. 12 of 2018. **(3)**

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Section 4: International Agreements, Conventions and Treaties

4.1 Choose the most correct answer from the options provided:

1. On 1 January 1995, General Agreement on Tariffs and Trade (GATT) was replaced by:
 - A. The Harare Protocol
 - B. The Hague Agreement
 - C. The Budapest Treaty
 - D. The TRIPS Agreement

2. South Africa has not acceded but has implemented:
 - A. The Madrid Protocol
 - B. The Nice Agreement
 - 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. The World Trade Organisation, which is the international agency responsible for the administration of TRIPS, is:
 - A. An organisation established by the World Intellectual Property Organisation (WIPO)
 - B. An organisation established under the General Agreement on Tariffs and Trade (GATT)
 - C. An organisation established by the United Nations (UN)
 - D. An organisation established under 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 accede to the TRIPS Agreement 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 in all countries
 - B. That an invention may be used by a person other than the patentee, for non-commercial purposes
 - C. That copyright is not infringed by *fair dealing*, such as use for private study or reporting of current events
 - D. That a patent is not infringed by a person using the invention for the purposes of obtaining and submitting information required by a regulatory authority for the registration of a medicament

9. Indicate which one of the following statements is **false**.
- The Doha Declaration stipulates that each member state has the freedom to:
- A. Determine what constitutes a national public health emergency
 - B. Determine which non-commercial activities will constitute patent infringement
 - C. Determine the requirements for a valid industrial design registration
 - D. Establish either an international/territorial regime of exhaustion of intellectual property rights
10. In our law, integrated circuit topographies ...
- (i) Are afforded protection as a species of functional design, under our Designs Act
 - (ii) Are afforded protection as an invention, under our Patents Act
 - (iii) Are afforded protection as a trade secret/know-how under our common law preventing unlawful competition
 - (iv) Are not afforded protection under our law
- Choose:
- A. (i) and (iii)
 - B. (iv)
 - C. (i) and (ii)
 - D. (ii) and (iii)
11. What is the principle of "National Treatment" as required by Article 3 of TRIPS?
- A. Treating nationals of other member countries less favourably than its own nationals
 - B. Treating nationals of other member countries the same as its own nationals
 - C. Disregarding the laws of other member countries, and regarding only the national laws of the member country
 - D. Providing special treatment to nationals of other member countries

12. Generally, what does Article 4 of TRIPS require regarding Most-Favoured-Nation Treatment?
- A. Advantages may be selectively given to some countries
 - B. Advantages should not be given to any country
 - C. Advantages given to any country must be extended to all member countries
 - D. Advantages given to any country must be extended only to countries within the same category of countries, i.e. countries in the “developed”, “developing” or “least developed” categories, as the case may be
13. According to Article 15.3 of the TRIPS Agreement, can the actual use of a trade mark be a precondition for filing an application for registration?
- A. Yes, use must always be a requirement
 - B. No, actual use cannot be a requirement for filing an application
 - C. Yes, use is required but only in specific cases
 - D. No, but members may provide for the removal of a trade mark registration on the basis of non-use.
14. TRIPS Agreement provides that a trade mark owner should have exclusive rights to prevent others from using identical or similar marks in trade. What condition must be met for these rights to be exercised?
- A. The goods/services must be from the same region
 - B. The goods/services must be identical or similar
 - C. The trade mark must be well-known internationally
 - D. The trade mark must be registered in multiple countries
15. How does Article 16.3 of the TRIPS Agreement extend beyond the provisions of the Paris Convention regarding well-known trademarks?
- A. It requires member countries to recognize well-known trade marks from other countries

- B. It allows for the registration of any well-known trade mark without opposition
- C. It extends protection to dissimilar goods/ services, where the use of the mark would likely damage the interests of the trade mark owner
- D. It mandates a global registry for well-known trade marks

(15)

4.2 (a) Explain how computer programs were afforded protection prior to the Copyright Amendment Act no. 125 of 1992. **(1)**

(b) Explain how computer programs are now afforded protection since the Copyright Amendment Act no. 125 of 1992. **(1)**

(c) Briefly explain how compilations and tables of information are afforded protection under our Copyright Act. **(1)**

(d) Briefly explain how the amendment of our copyright legislation in 1997, makes South African legislation fully compliant with TRIPS requirement (Article 11.2) for the protection of compilations of information. **(1)**

4.3 Consider the following scenario and answer the questions that follow:

A multinational pharmaceutical company, PharmaCorp, holds a patent for a life-saving drug called "CureAll" in several countries, including the United States, China and South Africa.

PharmaCorp manufactures CureAll in its factory in China and sells it in China for \$5 per pill. The same pill is sold in the United States for \$30 per pill and in South Africa for \$10 per pill due to different market conditions and regulatory environments.

A South African pharmaceutical distributor, MedImport, buys a large batch of CureAll pills from PharmaCorp in China and then imports them into

South Africa to sell them at a lower price than PharmaCorp's price in South Africa. PharmaCorp institutes an action against MedImport in South Africa, claiming patent infringement.

- (a) What is the principle of national exhaustion of patent rights? **(1)**
- (b) Indicate if PharmaCorp's case against MedImport would have merit if the principle of national exhaustion of rights were to apply. **(1)**
- (c) What is the principle of international exhaustion of patent rights? **(1)**
- (d) Indicate if PharmaCorp's case against MedImport would have merit if the principle of international exhaustion of rights were to apply. **(1)**

- 4.4 Explain one instance where SA IP legislation is not expressly compliant with TRIPS. **(2)**

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