

**PATENT EXAMINATION BOARD**

**2021 EXAMINATION**

**LEGAL FRAMEWORK FOR THE PROTECTION OF INTELLECTUAL PROPERTY IN SOUTH AFRICA**

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

Moderator: S. Clelland

Time: 4 hours

Marks: 100

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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**

In terms of the Act, when is it permissible for the proprietor of a trade mark to refer to the trade mark by using the letter “R” (meaning “registered”) – and when can the proprietor of a trade mark refer to it by using the letters “TM”? (2)

Is it a serious breach of the Act if the letter “R” is used incorrectly? (3)

**[total 5 marks]**

**QUESTION 1.2**

In a trade mark infringement matter before the High Court, what orders for relief can the High Court grant in terms of the Act to the proprietor of the trade mark registration on finding that the trade mark registration has been infringed? (4)

**QUESTION 1.3**

How is “trade mark” defined in the Act? (6)

**QUESTION 1.4**

What does section 10 provide in respect of:

- (a) a trade mark subject to an application for registration; and
- (b) a trade mark already registered?

**(a) (2 marks) and (b) (2 marks) - [total 4]**

**QUESTION 1.5**

Is it possible, in terms of the Act, for two identical trade marks to be registered by two different proprietors, respectively, in respect of the same or similar goods/services? Please explain this briefly in your answer. (3)

**QUESTION 1.6**

What specific provisions does the Act make in section 27 for the expungement of a registered trade mark on the grounds of non-use by the proprietor? (3)

**Total [25]**

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

- 2.1 What is the definition of a programme-carrying signal in terms of the Act? (2)
- 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 broadcast;  
2.3.2 computer program;  
2.3.3 artistic work;  
2.3.4 published edition;  
2.3.5 programme-carrying signal;  
2.3.6 literary work;  
2.3.7 sound recording;  
2.3.8 cinematograph film;  
2.3.9 musical work. (9)
- 2.4 Copyright in literary or musical works vests certain exclusive rights in the author. Name 4 (four). (8)

**Marks [25]**

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

1. Name the alternative forms of protection that Article 27(3)(b) of the TRIPS Agreement says that Member countries must provide for the protection of plant varieties. (2)
2. Name the five requirements for applying for a Plant Breeders' right for a variety of plant in South Africa, provided for in terms of Section 2 of the South African Plant Breeders' Rights Act. (5)
3. What is the duration of a Plant Breeder's Right in terms of Section 21 of the Plant Breeders' Rights Act? (3)
4. Your client, Vusi, is a plant breeder employed by Bloom's Nursery (Pty) Ltd. One day Vusi is walking through the nursery and notices a new rose that has a bigger and different colour flower to the other roses in the nursery. Vusi thinks that this rose has significant commercial value and decides that it needs to be commercialised.

With reference to the relevant Sections of the South African Plant Breeders' Rights Act, advise Vusi:

- a) what needs to be done to be in a position to file a Plant Breeders' Rights application, and (3)
  - b) who will have the right to apply for a Plant Breeders' Right for the new rose. (7)
- (10)
5. List five of the six acts that others are prohibited from performing without a licence in respect of a Plant Breeders' Right, in terms of Section 23 of the Plant Breeders' Rights Act. (5)

**Marks [25]**

**QUESTION 4: INTERNATIONAL AGREEMENTS, CONVENTIONS AND TREATIES**

4.1 Choose the most correct answer from the options provided: (10)

1. 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
  
2. True/False: Member countries of TRIPS may, but are not required, to afford protection to geographical indicators:
  - A. True
  - B. False
  
3. True/False: The DOHA Declaration is a declaration that nothing in the TRIPS Agreement is to be used to address the issue of exhaustion of IP rights for purposes of dispute settlement.
  - A. True
  - B. False
  
4. 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.
  
5. In our law, integrated circuit topographies are afforded protection under:
  - A. Trade Marks Act
  - B. Patents Act
  - C. Designs Act
  - D. All of the above

6. South Africa has acceded to and implemented:
- A. International Convention for the Protection of Industrial Property (Paris Convention)
  - B. Treaty on the International Recognition of the Deposit of Micro-organisms for the Purpose of Patent Procedure (Budapest Treaty)
  - C. Washington Treaty on IP in Respect of Integrated Circuits
  - D. A and B
  - E. A and C
7. True/False: TRIPS directs that diagnostic, therapeutic and surgical methods for treatment of humans/animals must be excluded from patent protection.
- A. True
  - B. False
8. True/False: According to TRIPS, member states should permit a trade mark registration to be cancelled after an uninterrupted period of at least 3 years of non-use (unless valid reasons based on the existence of obstacles to such use are shown by the trade mark owner).
- A. True
  - B. False
9. True/False: South African law complies fully with the TRIPS Agreement pertaining to the protection of undisclosed information during registration of pharmaceutical or agricultural products.
- A. True
  - B. False
10. South Africa has not acceded to and has not implemented:
- A. Locarno Agreement Establishing an International Classification for Industrial Designs
  - B. The WIPO Copyright Treaty
  - C. International Convention for the Protection of Literary and Artistic Works (Berne Convention)
  - D. A and B
  - E. B and C

4.2 Explain the principles of “National Treatment” and “Most-Favoured-Nation Treatment” as set out in Articles 3 and 4 of TRIPS. **(2)**

4.3 What are the 3 main objectives of the TRIPS Agreement? **(3)**

- 4.4 How does South African law on the registrability of a design applied to an article go beyond the provisions of the TRIPS agreement? (2)
- 4.5 Give two reasons why a group of companies would have one IP holding company own all of the group's intellectual property. (2)
- 4.6 Article 6 provides that nothing in the TRIPS agreement shall be used to address the issue of exhaustion of IP rights. In other words, each member state is free to determine the effect of a patent as it pertains to the on-sale of a patented article.
- (a) Explain what is meant by the doctrine of "exhaustion of rights". (1)
- (b) Explain the difference between national exhaustion of rights and international exhaustion of rights. (2)
- (c) Explain South African law as it pertains to exhaustion of a patentee's rights. In your explanation, consider the following circumstances: (3)
- The patentee himself sells the patented article
  - The patentee's licensee/distributor sells the patented article

**Marks [25]**