

PATENT EXAMINATION BOARD

EXAMINATION 2019

LEGAL FRAMEWORK FOR THE PROTECTION OF INTELLECTUAL PROPERTY IN
SOUTH AFRICA

Group 1(a)

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Time: 4 hours

Marks: 100

Instructions:

1. The paper consists of a total of 6 pages (including the cover page).
2. Answer all four sections.
3. Note that the four sections carry equal mark values; accordingly, equal time should be devoted to each of the sections.
4. 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 What, in terms of the Act, is the definition of “MARK”? (3)
- 1.2 What, in terms of the Act, is the definition of “TRADE MARK”? (5)
- 1.3 Section 10 is an important section of the Act, and provides a list of various categories of marks. How many categories are listed in this section, and what is the overall relevance of these categories? (4)
- 1.4 Where application is made for registration of a mark that consists of or includes the name or representation of a person, the Registrar may require the applicant to furnish him with a certain document. What is that document? (4)
- 1.5 List the requirements or elements to be proved, in terms of section 34(1)(a) of the Act, in an infringement situation where the respective goods or services are identical. (5)
- 1.6 What, in terms of the Act, is “permitted use” of a registered trade mark? (2)
- 1.7 What is a “collective” trade mark? (2)
- [25]

Section 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 What is the definition of “emitted signal” in terms of the Act? (2)
- 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 literary work;
 - 2.3.3 photograph;
 - 2.3.4 published edition;
 - 2.3.5 programme-carrying signal. (5)
- 2.4 There are two main requirements for any work to be eligible for copyright under the Act. What are they? (2)
- 2.5 Name two circumstances under which copyright in a literary or musical work will not be infringed? (4)
- 2.6 In terms of the Act, what is the term of copyright in 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)
- 2.7 Under what circumstances will a work not be eligible for copyright protection? (3)

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Section 3 – Plant Breeders’ Rights

- 3.1 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)
- 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”. Explain what is required for a variety to be “new” in terms of Section 2 of the South African Plant Breeders’ Rights Act, No. 15 of 1976. (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 What is the duration of a Plant Breeder’s Right in terms of Section 21 of the Plant Breeders’ Rights Act? (3)
- 3.5 Your client, Marie, is a farmer who is self-employed and farms proteas. One day she is walking in her plantation and notices a plant that has bloomed earlier than the others and the flower has a different colour. A friend of hers, Vusi, is a plant breeder and she arranges for him to take samples of the plant and grow new plants from these. He grows the new plants and after several generations he is able to produce the plant which consistently blooms early and maintains the colour. Marie and Vusi have no agreement as to who owns the new variety.
- With reference to the relevant sections of the Plant Breeders’ Rights Act, explain who may apply for Plant Breeders’ Rights protection in South Africa for this variety. (8)
- 3.6 Explain the so-called “Researcher/Breeders” exemption that is available in terms of Section 23(6)(c) and (d) of the SA Plant Breeders’ Rights Act. (2)

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Section 4: International Agreements, Conventions and Treaties

- 4.1 Indicate True/False to the following statements:
- a) The General Agreement on Tariffs and Trade (GATT) was a precursor to TRIPS and was replaced by TRIPS.
 - b) TRIPS requires that member countries comply with certain articles of the 1971 Text of the Berne Convention, with the exception of the so-called moral rights provisions. South Africa has acceded to the 1971 Text of the Berne Convention.
 - (c) TRIPS leaves it up to the individual member countries to decide whether to provide for the protection of integrated circuits (IC's).
 - d) South Africa has acceded to the Strasbourg Agreement concerning the International Patent Classification (IPC).
 - e) WIPO is an intergovernmental organisation and one of the specialised agencies of the United Nations.
 - (f) The Rome Convention relates to performing rights, phonograms (sound recordings) and broadcasts.
 - (g) TRIPS requires that use of a mark be a precondition for filing an application in respect of that mark.
 - (h) TRIPS prescribes that member states follow the principle of international exhaustion of rights. (8)
- 4.2 Name four international treaties/conventions pertaining to intellectual property to which **South Africa has already acceded**. (2)
- 4.3 Name four international treaties/conventions pertaining to intellectual property, to which **South Africa has not yet acceded and has not implemented**. (2)
- 4.4 Explain the principles of “National Treatment” and “Most-Favoured-Nation Treatment” as set out in Articles 3 and 4 of TRIPS. (2)
- 4.5 Provide 3 main objectives of the TRIPS Agreement. (3)

- 4.6 TRIPS requires that protection be accorded to computer programs. Explain how computer programs are protected in our law. (1)
- 4.7 The Doha Declaration came about because certain states requested clarification on interpretation and implemented of the TRIPS Agreement in a manner that is supportive of members' right to protect public health and, in particular, to promote access to medicines for all.
How did the Doha Declaration achieve this objective? (2)
- 4.8 TRIPS provides that judicial authorities may have the authority to order an infringer to disclose to the right holder the identity of third parties involved in the infringement or the distribution of infringing goods.
Give one example of:
(a) Statute that expressly conveys this authority on a judicial authority; and
(b) a procedure, based on court rules, which has evolved to obtain information from an alleged infringer. (2)
- 4.9 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 how the so-called Bolar provision in our Patents Act (s69(A)) restricts the rights of a patentee in this way. (2)
- 4.10 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)

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