

**DEPARTMENT OF TRADE AND INDUSTRY**

**PATENT EXAMINATION BOARD**

**SUPPLEMENTARY EXAMINATION 2016**

**Group 1 Subject (a)**

**Legal Framework for the Protection of Intellectual Property in South Africa**

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

Moderator: L. van der Walt  
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”)**

- 1.1 What, in terms of the Act, is the definition of:
- a) “device”; and
  - b) “trade mark”
- (6)**
- 1.2 Does the Act provide a listing i.e. categories of marks that do not qualify for registration? If so, what section is that?
- (3)**
- 1.3 Does the Act provide a fundamental requirement for a mark to be registrable as a trade mark? If so, what is that requirement?
- (4)**
- 1.4 A client consults you for advice regarding a mark that he has used in respect of his clothing products for about 20 years. He explains that the mark includes a somewhat descriptive element but that members of the public have come to know that the mark indicates his clothing. Will he be able to register that mark as his trade mark? If so, why and in terms of what section of the Act?
- (4)**
- 1.5 In regard to the set of facts in question 1.4, what if your client’s mark is similar to a 25 year old mark i.e. a pre-existing mark used by a competitor business on its clothing products in his city. Is it still possible for your client to register his mark? If so, on what basis and in terms of what section of the Act?
- (3)**
- 1.6 What relief can a proprietor of a trade mark registration obtain from the High Court in the event that he/she institutes infringement proceedings against an infringer?
- (5)**

**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? (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 photographs;
- 2.3.2 published editions. (4)
- 2.4 In terms of the Copyright Act, “publication” shall not include certain categories of works. Name three (3). (6)
- 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 literary or musical work. Name three? (3)

**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. 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 South African Plant Breeders' Rights Act in respect of "new".  

**(4)**
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)**
4. Provide the definition in terms of Section 1 of the Plant Breeders' Rights Act for the "breeder" of a variety.  

**(3)**
5. After a Plant Breeders' Right application is filed in South Africa, what is the deadline for making plant material to the Registrar available for testing purposes?  

**(1)**
6. What is the duration of a Plant Breeder's Right in terms of Section 21 of the Plant Breeders' Rights Act?  

**(3)**
7. List the remedies that are available to the holder of a Plant Breeder's Right in South Africa that has been infringed.  

**(4)**
8. Explain the so-called "Researcher/Breeders'" exemption that is available in terms of Section 23(6)(a) and (b) of the SA Plant Breeders' Rights Act.  

**(2)**

**Marks [25]**

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

- 4.1 Explain how the public's general perception of intellectual property has changed over the past 50 years. (1)
- 4.2 Aside from preventing others from making, using, exercising, disposing of and offering to dispose of a patented invention, briefly describe 4 other ways in which a patentee could derive benefit from their patent portfolio. (2)
- 4.3 Indicate (yes/no) if South Africa has acceded to the following conventions/treaties:
- a) Rome Convention for the Protection of Performers and Producers of Phonograms and Broadcasting Organisations
  - b) International Convention for the Protection of Industrial Property
  - c) International Convention for the Protection of Literary and Artistic Works
  - d) Treaty on the International Recognition of the Deposit of Micro-organisms for the Purpose of Patent Procedure
  - e) WIPO Copyright Treaty
  - f) WIPO Performances and Phonograms Treaty
- (6)
- 4.4
- 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.  
  
Describe 2 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)

4.5

- 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)

4.6 Article 19 of TRIPS provides that if use is required to maintain a trade mark registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trade mark owner.

Does our legislation comply with this provision? Does our legislation go beyond this provision? Explain your answer. (2)

4.7 Give an example from South African Design Law where our legislation goes beyond the provisions of the TRIPS agreement? (2)

4.8 How does the TRIPS provision on the protection of well known marks go beyond the provisions of the Paris Convention? (2)

**Marks [25]**

**Total Marks [100]**