

27 May 2010

8h30

Hall 29
Balcony

EXAMS OFFICE
USE ONLY

University of the Witwatersrand, Johannesburg

Course or topic No(s)

LAWS 4030

Course topic names(s)
Paper Number & title

Intellectual Property Law

Examination / Test* to be held during month(s) of (*delete as applicable)

Examination May 2010

Year of study
(Art & Science leave blank)

Degrees / Diplomas for which this course is prescribed
(BSc (Eng) should indicate which branch)

LLB

Faculty/ies presenting candidates

COMMERCE, LAW AND MANAGEMENT

Internal examiner(s) and telephone extension number(s)

I Currie 78448
A Apostolides
P Andanda

External examiner(s)

Ms L-A Tong (UCT)

Special materials required (graph/music/drawing paper maps, diagrams, tables, computer cards, etc)

None

Time allowance

Course no: LAWS 4030 hours: 2

Instructions to candidates
Examiners may wish to use this space to indicate, inter alia, the contribution made by this examination or test towards the year mark, if appropriate

Answer all questions.

Internal Examiners of Heads of Departments are requested to sign the declaration overleaf

LAWS 4030
INTELLECTUAL PROPERTY LAW
EXAMINATION MAY 2010

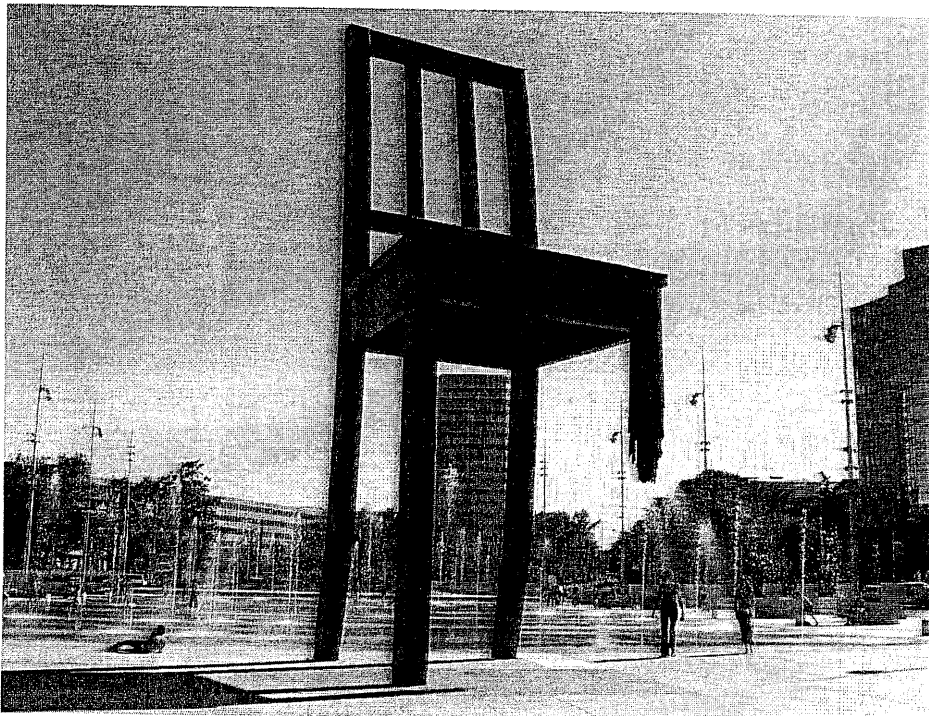
Answer all questions.

SECTION A

Question 1

Dorian works as an events manager at Dee Art Gallery (Pty) Ltd in Johannesburg. During the weekends, she runs her own small business of framing photographs. During her previous summer vacation to Geneva, Switzerland, she took a photograph of the renowned sculpture of a giant three- legged chair that is found outside the United Nations Headquarters in Geneva.

Here is the photograph that Dorian took:



Finding her photograph quite fascinating, Dorian framed it and hung it on her office wall at Dee Art Gallery (Pty) Ltd's premises.

- a) Is the sculpture of the giant three- legged chair that Dorian photographed eligible for copyright in terms of the Copyright Act? Assuming that it is eligible for copyright and taking into consideration that Switzerland does not follow the *Rule of the Shorter Term*, when will copyright expire? (4 marks)
- b) Assume that the sculpture is copyrightable. Advise Dorian whether her photograph is eligible for copyright. If it is eligible, when will copyright expire? (6 marks)

Smith is Dorian's colleague and works as a painter at Dee Art Gallery (Pty). He admires the photograph hanging on Dorian's wall whenever he goes into her office for meetings. While

Dorian is away from the office for an art exhibition in Cape Town, Smith seizes his opportunity; he removes the photograph from Dorian's wall and reproduces it on a canvas by sketching it with black oil paint. He returns the framed photograph to Dorian's office without leaving any trace of interference.

Smith's painting on canvas looks like this:



On returning to the office, Dorian pays a courtesy call on Smith and sees the oil painting of the giant three-legged chair on canvas among his paintings, which are scheduled to be displayed at the next arts exhibition at Dee Art Gallery. She identifies the painting as deriving from the photograph on her office wall and is very upset with Smith for stealing her idea. Dorian is considering instituting copyright infringement proceedings against Smith.

- c) **Advise Dorian of her prospects of success in copyright infringement proceedings against Smith. (10 Marks)**

Total for question 1: 20 marks

Question 2

Pick n Pay® is a registered trade mark of the Pick n Pay Group Ltd. The company has a total of 775 supermarkets throughout South Africa. It employs over 38 000 people, and generates an annual turnover of R54-billion. The trade mark is registered for use in class 35 (retail services).

Amos is the owner of a supermarket in Johannesburg, which trades as Buyright Stores. His principal competitor is a large Pick n Pay supermarket located just two blocks away from his store. Amos places an advertisement in the newspaper which reads as follows:

IS PICK n PAY REALLY THE CHEAPEST?

If you shop regularly at Buyright Stores you will make significant savings. We have calculated that a family spending R500 each week in Buyright Stores saved between R366 and R1 129 last year by shopping at Buyright rather than at Pick n Pay.

CHOOSE RIGHT
PICK BUYRIGHT n PAY LESS!

- (a) Consider Pick n Pay's prospects of success in an infringement action against Amos in terms of s 34(1)(a) of the Trade Marks Act. (5 marks)
- (b) Consider Pick n Pay's prospects of success in an infringement action against Amos in terms of s 34(1)(c) of the Trade Marks Act. (5 marks)

Total for question 2: 10 marks

Section B

Multiple choice questions

Answer all questions by writing down the question number and the letter corresponding to the correct answer.

There are ten questions in total. There is only one correct answer per question. There is no penalty for the wrong answer.

3. What must a party who is alleging infringement of copyright in a cartoon strip prove?
- a) That the embodiment of the idea in the cartoon strip has been copied.
 - b) That the cartoon strip is a literary work.
 - c) That the idea, which is embodied in the cartoon strip, has been copied.
 - d) That the concept, which is conveyed in the cartoon strip, has been copied.
 - e) That a considerable number of the cartoon strips have been copied.
4. HB studios recently announced the forthcoming release of Killzone 3[®] a video game for the Xbox360[®] platform. The video game will be released in September 2011 and falls into a genre known as FPS (first-person shooter) games.

How is the new game likely to be classified in terms of the South African intellectual property law?

- a) A computer programme in terms of the Copyright Act;
- b) An artistic work in terms of the Copyright Act;
- c) A registered trade-mark;

- d) A cinematograph film in terms of the Copyright Act;
 - e) A patentable invention.
5. Which of the following are requirements for the vesting of copyright in a work of architecture erected in the Republic of South Africa?
- (a) The work must be registered;
 - (b) Publication;
 - (c) Existence in a material form;
 - (d) The author must be a qualified person in terms of the Copyright Act;
 - (e) Originality.
6. Which of the following is/are patentable:
- (a) A new metal that was discovered accidentally;
 - (b) The score to a new musical piece of classical music;
 - (c) A novel and inventive computer system;
 - (d) A novel and inventive braking system for a car which was disclosed without permission by an employee; and
 - (e) A method for advertising;
 - (f) (a) and (c);
 - (g) (c) and (d);
 - (h) (c) and (d) and (e).
7. You are sued for patent infringement out of the magistrate's court by a licensee of right. Which of the following defences could you raise:
- (a) Only the patentee may sue;
 - (b) You may only sue out of the Court of the Commissioner of Patents;
 - (c) (a) and (b)
 - (d) None of the above.
8. Which of the following would establish a priority date for a subsequent patent application (local or international as the case may be), assuming that the subject matter in both would be identical :
- (a) The date on which a South African provisional patent application is filed at the South African Patent Office;
 - (b) The date on which a South African complete patent application is filed in the first instance at the South African Patent Office;
 - (c) The date that a Patent Co-operation Treaty patent application is filed in the first instance at the International Bureau;
 - (d) All of the above.
 - (e) None of the above.
9. A patent lasts 20 years from which of the following dates?

- (a) the date of filing a complete patent application;
 - (b) the date of grant of the complete patent application;
 - (c) the date of acceptance of the complete patent application;
 - (d) the date of receipt of the complete patent application in the South African Patent Office;
 - (e) the date of publication of the complete patent application in the Government Gazette.
10. In which of the following circumstances can a joint patentee deal with the patent without permission from the other joint patentees:
- (a) to keep the patent alive by paying renewal fees;
 - (b) enter into a license agreement under the patent;
 - (c) amend the patent to save it from invalidity;
 - (d) institute patent infringement proceedings individually but giving notice to joint patentees;
 - (e) (a) and (c);
 - (f) (a) and (d);
 - (g) (a) and (c) and (d);
 - (h) all of the above.
11. According to the court, the trade mark in question in *Cadbury (Pty) Ltd v Beacon Sweets and Chocolates (Pty) Ltd* 2000 (2) SA 771 (SCA) was a 'textbook case for a disclaimer'. If a disclaimer had been entered in this case which of the following would have been the result?
- (a) The trade mark 'Liquorice Allsorts' would have been registered but the proprietor would have disclaimed any right to the exclusive use of the words 'Liquorice Allsorts'.
 - (b) The trade mark 'Liquorice Allsorts' was unregistrable because it was descriptive of the kind of goods to which it was applied.
 - (c) Though 'Liquorice Allsorts' could be registered as a trade mark, any competitor could apply at any time for the removal of the trade mark from the register.
 - (d) Though the trade mark 'Liquorice Allsorts' was not inherently distinctive, it was registrable because it had become distinctive through use.
 - (e) The composite trade mark 'Beacon Liquorice Allsorts' would have been registered but the proprietor would have disclaimed any right to the exclusive use of the words 'Liquorice Allsorts'.
12. Which of the following best describes the holding of the court in *Beecham Group plc v Triomed (Pty) Ltd* 2003 (3) SA 639 (SCA)?
- (a) Beecham's pill was the only antibiotic pill on the market with a bi-concave oval shape and it was therefore distinctive and registrable in terms of s 9 of the Trade Marks Act.
 - (b) Beecham's patent on Augmentin had expired and competitors could not be prevented from manufacturing pills with a similar shape or the same shape as the Augmentin pill.

- (c) The shape of the Augmentin pill provided a reasonable technical solution to the problem that some patients find it difficult to swallow large pills; it was therefore not registrable in terms of s 10(5) and s 10(11) of the Trade Marks Act.
- (d) It was possible for competitors to deliver the antibiotic in a pill with a different shape to that of Augmentin; registration of the shape was therefore permitted in terms of the definition of 'mark' in s 1 of the Trade Marks Act.
- (e) It is not permitted to register the shape of a pill as a trade mark as this will inhibit the development of the pharmaceutical industry in terms of s 10(11) of the Trade Marks Act.

Total for section C: 10 marks

Total for paper: 40 marks

Appendix Extracts from legislation

TRADE MARKS ACT 194 OF 1993

2. Definitions --(1) In this Act, unless the context otherwise indicates—

"mark" means any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned;

"trade mark", other than a certification trade mark or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person;

(3) (a) References in this Act to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in physical or other relation to, such goods.

(b) References in this Act to the use of a mark in relation to services shall be construed as references to the use thereof in any relation to the performance of such services.

9. Registrable trade marks.—(1) In order to be registrable, a trade mark shall be capable of distinguishing the goods or services of a person in respect of which it is registered or proposed to be registered from the goods or services of another person either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within those limitations.

(2) A mark shall be considered to be capable of distinguishing within the meaning of subsection (1) if, at the date of application for registration, it is inherently capable of so distinguishing or it is capable of distinguishing by reason of prior use thereof.

10. Unregistrable trade marks.—The following marks shall not be registered as trade marks or, if registered, shall, subject to the provisions of sections 3 and 70, be liable to be removed from the register:

(1) A mark which does not constitute a trade mark;

(2) a mark which—

(a) is not capable of distinguishing within the meaning of section 9; or

(b) consists exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services; or

(c) consists exclusively of a sign or an indication which has become customary in the current language or in the *bona fide* and established practices of the trade;

(3) a mark in relation to which the applicant for registration has no *bona fide* claim to proprietorship;

(4) a mark in relation to which the applicant for registration has no *bona fide* intention of using it as a trade mark, either himself or through any person permitted or to be permitted by him to use the mark as contemplated by section 38;

(5) a mark which consists exclusively of the shape, configuration, colour or pattern of goods where such shape, configuration, colour or pattern is necessary to obtain a specific technical result, or results from the nature of the goods themselves;

[Para. (5) substituted by s. 59 (a) of Act No. 38 of 1997.]

(6) subject to the provisions of section 36 (2), a mark which, on the date of application for registration thereof, or, where appropriate, of the priority claimed in respect of the application for registration thereof, constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark within the meaning of section 35 (1) of this Act and which is used for goods or services identical or similar to the goods or services in respect of which the trade mark is well-known and where such use is likely to cause deception or confusion;

[Para. (6) substituted by s. 59 (b) of Act No. 38 of 1997.]

(7) a mark the application for registration of which was made *mala fide*;

...

(11) a mark which consists of a container for goods or the shape, configuration, colour or pattern of goods, where the registration of such mark is or has become likely to limit the development of any art or industry;

(12) a mark which is inherently deceptive or the use of which would be likely to deceive or cause confusion, be contrary to law, be *contra bonos mores*, or be likely to give offence to any class of persons;

(13) a mark which, as a result of the manner in which it has been used, would be likely to cause deception or confusion;

(14) subject to the provisions of section 14, a mark which is identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion, unless the proprietor of such trade mark consents to the registration of such mark;

(15) subject to the provisions of section 14 and paragraph (16), a mark which is identical to a mark which is the subject of an earlier application by a different person, or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which the mark in respect of which the earlier application is made, would be likely to deceive or cause confusion, unless the person making the earlier application consents to the registration of such mark;

- (16) a mark which is the subject of an earlier application as contemplated in paragraph (15), if the registration of that mark is contrary to existing rights of the person making the later application for registration as contemplated in that paragraph;
- (17) a mark which is identical or similar to a trade mark which is already registered and which is well-known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of deception or confusion, unless the proprietor of such trade mark consents to the registration of such mark:

[Para. (17) substituted by s. 59 (d) of Act No. 38 of 1997.]

Provided that a mark shall not be refused registration by virtue of the provisions of paragraph (2) or, if registered, shall not be liable to be removed from the register by virtue of the said provisions if at the date of the application for registration or at the date of an application for removal from the register, as the case may be, it has in fact become capable of distinguishing within the meaning of section 9 as a result of use made of the mark.

15. Registration subject to disclaimer.—If a trade mark contains matter which is not capable of distinguishing within the meaning of section 9, the registrar or the court, in deciding whether the trade mark shall be entered in or shall remain on the register, may require, as a condition of its being entered in or remaining on the register—

- (a) that the proprietor shall disclaim any right to the exclusive use of all or any portion of any such matter to the exclusive use of which the registrar or the court holds him not to be entitled; or
- (b) that the proprietor shall make such other disclaimer or memorandum as the registrar or the court may consider necessary for the purpose of defining his rights under the registration:

Provided that no disclaimer or memorandum on the register shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made.

33. Registration a condition precedent to an action for infringement.—No person shall be entitled to institute any proceedings under section 34 in relation to a trade mark not registered under this Act: Provided that nothing in this Act shall affect the rights of any person, at common law, to bring any action against any other person.

34. Infringement of registered trade mark.—(1) The rights acquired by registration of a trade mark shall be infringed by—

- (a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;
- (b) the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion;
- (c) the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception: Provided that the provisions of this paragraph shall not apply to a trade mark referred to in section 70 (2).

(2) A registered trade mark is not infringed by—

- (a) any *bona fide* use by a person of his own name, the name of his place of business, the name of any of his predecessors in business, or the name of any such predecessor's place of business;

- (b) the use by any person of any *bona fide* description or indication of the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of his goods or services, or the mode or time of production of the goods or the rendering of the services;
- (c) the *bona fide* use of the trade mark in relation to goods or services where it is reasonable to indicate the intended purpose of such goods, including spare parts and accessories, and such services;
- (d) the importation into or the distribution, sale or offering for sale in the Republic of goods to which the trade mark has been applied by or with the consent of the proprietor thereof;
- (e) the *bona fide* use by any person of any utilitarian features embodied in a container, shape, configuration, colour or pattern which is registered as a trade mark;
- (f) the use of a trade mark in any manner in respect of or in relation to goods to be sold or otherwise traded in, or services to be performed, in any place, or in relation to goods to be exported to any market, or in any other manner in relation to which, having regard to any conditions or limitations entered in the register, the registration does not extend;
- (g) the use of any identical or confusingly or deceptively similar trade mark which is registered:

Provided that paragraph (a) shall not apply to the name of any juristic person whose name was registered after the date of registration of the trade mark: Provided further that the use contemplated in paragraph (a), (b) or (c) is consistent with fair practice.

(3) Where a trade mark registered in terms of this Act has been infringed, any High Court having jurisdiction may grant the proprietor the following relief, namely—

- (a) an interdict;
- (b) an order for removal of the infringing mark from all material and, where the infringing mark is inseparable or incapable of being removed from the material, an order that all such material be delivered up to the proprietor;
- (c) damages, including those arising from acts performed after advertisement of the acceptance of an application for registration which, if performed after registration, would amount to infringement of the rights acquired by registration;
- (d) in lieu of damages, at the option of the proprietor, a reasonable royalty which would have been payable by a licensee for the use of the trade mark concerned, including any use which took place after advertisement of the acceptance of an application for registration and which, if taking place after registration, would amount to infringement of the rights acquired by registration.

[Sub-s. (3) amended by s. 64 (a) of Act No. 38 of 1997. Para. (d) substituted by s. 64 (b) of Act No. 38 of 1997.]

(4) For the purposes of determining the amount of any damages or reasonable royalty to be awarded under this section, the court may direct an enquiry to be held and may prescribe such procedures for conducting such enquiry as it may deem fit.

(5) Before a person institutes proceedings in terms of this section he shall give notice in writing of his intention to do so to every user concerned whose name is recorded in the register, and any such registered user shall be entitled to intervene in such proceedings and to recover any damages he may have suffered as a result of the infringement.

35. Protection of well-known marks under Paris Convention.—(1) References in this Act to a trade mark which is entitled to protection under the Paris Convention as a wellknown trade mark, are to a mark which is well known in the Republic as being the mark of—

- (a) a person who is a national of a convention country; or

(b) a person who is domiciled in, or has a real and effective industrial or commercial establishment in, a convention country,

whether or not such person carries on business, or has any goodwill, in the Republic.

(1A) In determining for the purposes of subsection (1) whether a trade mark is well-known in the Republic, due regard shall be given to the knowledge of the trade mark in the relevant sector of the public, including knowledge which has been obtained as a result of the promotion of the trade mark.

[Sub-s. (1A) inserted by s. 65 (a) of Act No. 38 of 1997.]

(2) A reference in this Act to the proprietor of such a mark shall be construed accordingly.

(3) The proprietor of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark is entitled to restrain the use in the Republic of a trade mark which constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of the well-known trade mark in relation to goods or services which are identical or similar to the goods or services in respect of which the trade mark is well known and where the use is likely to cause deception or confusion.

(4) Where, by virtue of section 10 (8), the authorization of the competent authority of a convention country or an international organization is required for the registration of a mark as a trade mark, such authority or organization is entitled to restrain the use in the Republic of such a mark without such authorization.

[Sub-s. (4) added by s. 65 (b) of Act No. 38 of 1997.]

36. Saving of vested rights.—(1) Nothing in this Act shall allow the proprietor of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in respect of goods or services in relation to which that person or a predecessor in title of his has made continuous and *bona fide* use of that trade mark from a date anterior—

(a) to the use of the first-mentioned trade mark in relation to those goods or services by the proprietor or a predecessor in title of his; or

(b) to the registration of the first-mentioned trade mark in respect of those goods or services in the name of the proprietor or a predecessor in title of his,

whichever is the earlier, or to object (on such use being proved) to the trade mark of that person being registered in respect of those goods or services under section 14.

(2) Nothing in this Act shall allow the proprietor of a trade mark entitled to protection of such trade mark under the Paris Convention as a well-known trade mark, to interfere with or restrain the use by any person of a trade mark which constitutes, or the essential parts of which constitute, a reproduction, imitation or translation of the well known trade mark in relation to goods or services in respect of which that person or a predecessor in title of his has made continuous and *bona fide* use of the trade mark from a date anterior to 31 August 1991 or the date on which the trade mark of the proprietor has become entitled, in the Republic, to protection under the Paris Convention, whichever is the later, or to object (on such use being proved) to the trade mark of that person being registered in relation to those goods or services under section 14.

COPYRIGHT ACT 98 OF 1978

1 Definitions

(1) In this Act, unless the context otherwise indicates—

'adaptation', in relation to—

(a) a literary work, includes—

(i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;

(ii) in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;

(iii) a translation of the work; or

- (iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;
 - (b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;
 - (c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable;
 - (d) a computer program includes-
 - (i) a version of the program in a programming language, code or notation different from that of the program; or
 - (ii) a fixation of the program in or on a medium different from the medium of fixation of the program;
- [Para. (d) added by s. 1 (a) of Act 125 of 1992.]

'**artistic work**' means, irrespective of the artistic quality thereof

- (a) paintings, sculptures, drawings, engravings and photographs;
 - (b) works of architecture, being either buildings or models of buildings; or
 - (c) works of craftsmanship not falling within either paragraph (a) or (b);
- [Para. (c) substituted by s. 1 (a) of Act 66 of 1983 and by s. 1 (b) of Act 125 of 1992.]

'**author**', in relation to-

- (a) a literary, musical or artistic work, means the person who first makes or creates the work;
 - (b) a photograph, means the person who is responsible for the composition of the photograph;
 - (c) a sound recording, means the person by whom the arrangements for the making of the sound recording were made;
- [Para. (c) substituted by s. 1 (c) of Act 125 of 1992.]
- (d) a cinematograph film, means the person by whom the arrangements for the making of the film were made;
 - (e) a broadcast, means the first broadcaster;
- [Para. (e) substituted by s. 1 (c) of Act 125 of 1992.]
- (f) a programme-carrying signal, means the first person emitting the signal to a satellite;
- [Para. (f) substituted by s. 1 (c) of Act 125 of 1992.]
- (g) a published edition, means the publisher of the edition;
- [Para. (g) added by s. 1 (a) of Act 52 of 1984.]
- (h) a literary, dramatic, musical or artistic work or computer program which is computer-generated, means the person by whom the arrangements necessary for the creation of the work were undertaken;
- [Para. (h) added by s. 1 (d) of Act 125 of 1992.]
- (i) a computer program, the person who exercised control over the making of the computer program;
- [Para. (i) added by s. 1 (d) of Act 125 of 1992.]

'**copy**' means a reproduction of a work, and, in the case of a literary, musical or artistic work, a cinematograph film or a computer program, also an adaptation thereof: Provided that an object shall not be taken to be a copy of a work of architecture unless the object is a building or a model of a building;

[Definition of 'copy' substituted by s. 1 (h) of Act 125 of 1992.]

'**copyright**' means copyright under this Act;

'**dramatic work**' includes a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented, but does not include a cinematograph film as distinct from a scenario or script for a cinematograph film;

'**drawing**' includes any drawing of a technical nature or any diagram, map, chart or plan;

[Definition of 'drawing' substituted by s. 1 (b) of Act 66 of 1983.]

'**literary work**' includes, irrespective of literary quality and in whatever mode or form expressed-

- (a) novels, stories and poetical works;

(b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
(c) textbooks, treatises, histories, biographies, essays and articles;
(d) encyclopaedias and dictionaries;
(e) letters, reports and memoranda;
(f) lectures, speeches and sermons; and
(g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer,
[Para. (g) substituted by s. 50 (e) of Act 38 of 1997.]
but shall not include a computer program;
[Definition of 'literary work' substituted by s. 1 (p) of Act 125 of 1992.]

'**musical work**' means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music;
[Definition of 'musical work' inserted by s. 1 (q) of Act 125 of 1992.]

'**performance**' includes any mode of visual or acoustic presentation of a work, including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, speeches and sermons, includes delivery thereof; and references to '**perform**' in relation to a work shall be construed accordingly: Provided that '**performance**' shall not include broadcasting or rebroadcasting or transmitting a work in a diffusion service;
[Definition of 'performance' substituted by s. 1 (r) of Act 125 of 1992.]

'**photograph**' means any product of photography or of any process analogous to photography, but does not include any part of a cinematograph film;

'**published edition**' means the first print by whatever process of a particular typographical arrangement of a literary or musical work;
[Definition of 'published edition' inserted by s. 1 (c) of Act 52 of 1984.]

'**qualified person**' means a qualified person within the meaning of section 3 (1);

'**record**' means any disc, tape, perforated role or other device in or on which sounds, or data or signals representing sounds, are embodied or represented so as to be capable of being automatically reproduced or performed therefrom;
[Definition of 'record' substituted by s. 50 (g) of Act 38 of 1997.]

'**reproduction**', in relation to-

(a) a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film;
(b) an artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form;
(c) any work, includes a reproduction made from a reproduction of that work,
[Para. (c) added by s. 1 (d) of Act 66 of 1983.]
and references to '**reproduce**' and '**reproducing**' shall be construed accordingly;

'**work**' a work contemplated in section 2;
[Definition of 'work' inserted by s. 1 (w) of Act 125 of 1992.]

'**work of joint authorship**' means a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors;

'**writing**' includes any form of notation, whether by hand or by printing, typewriting or any similar process.

(2) Any reference in this Act to a sound-track associated with a cinematograph film shall be construed as a reference to any record of sounds which is incorporated in any print, negative, tape or other article on which

the film or part of it, in so far as it consists of visual images, is recorded or which is issued by the author of the film for use in conjunction with such an article.

(2A) Any reference in this Act to the doing of any act in relation to any work shall, unless the context otherwise indicates, be construed as a reference also to the doing of any such act in relation to any substantial part of such work.

[Sub-s. (2A) inserted by s. 1 of Act 56 of 1980.]

(3) The provisions of this Act shall with reference to any act or omission outside the territorial limits of the Republic by or on any ship or aircraft registered under any law in the Republic apply in the same manner as it applies with reference to acts or omissions within the territorial limits of the Republic.

(4) Notwithstanding the provisions of paragraph (i) of the definition of 'author' in subsection (1), the author of a computer program made before the date of commencement of the Copyright Amendment Act, 1992, shall be deemed to be the person who first made or created the program, but if such computer program is original and has been published by a qualified person, such person shall be presumed to be the owner of the copyright subsisting in the computer program concerned, unless the contrary is proved.

[Sub-s. (4) added by s. 1 (x) of Act 125 of 1992.]

(5) For the purposes of this Act the following provisions shall apply in connection with the publication of a work:

(a) Subject to paragraph (e), a work shall be deemed to have been published if copies of such work have been issued to the public with the consent of the owner of the copyright in the work in sufficient quantities to reasonably meet the needs of the public, having regard to the nature of the work.

(b) Publication of a cinematograph film or sound recording is the sale, letting, hire or offer for sale or hire, of copies thereof.

(c) A publication shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere within a period of 30 days.

(d) Publication shall not include-

(i) a performance of a musical or dramatic work, cinematograph film or sound recording;

(ii) a public delivery of a literary work;

(iii) a transmission in a diffusion service;

(iv) a broadcasting of a work;

(v) an exhibition of a work of art;

(vi) a construction of a work of architecture.

(e) For the purposes of sections 6, 7 and 11 (b) [sic], a work shall be deemed to be published if copies thereof have been issued to the public.

[Sub-s. (5) added by s. 1 (x) of Act 125 of 1992.]

[Date of commencement of s. 1: 30 June 1978.]

CHAPTER 1

COPYRIGHT IN ORIGINAL WORKS (ss 2-22)

2 Works eligible for copyright

(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright-

(a) literary works;

(b) musical works;

(c) artistic works;

(d) cinematograph films;

[Para. (d) substituted by s. 2 (a) of Act 125 of 1992.]

(e) sound recordings;

(f) broadcasts;

(g) programme-carrying signals;

(h) published editions;

[Para. (h) added by s. 2 of Act 52 of 1984.]

(i) computer programs.

[Para. (i) added by s. 2 (b) of Act 125 of 1992.]

[Sub-s. (1) amended by s. 2 (a) of Act 56 of 1980.]

(2) A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form.

[Sub-s. (2) substituted by s. 2 (b) of Act 56 of 1980, by s. 2 (c) of Act 125 of 1992 and by s. 51 of Act 38 of 1997.]

(2A) A broadcast or a programme-carrying signal shall not be eligible for copyright until, in the case of a broadcast, it has been broadcast and, in the case of a programme-carrying signal, it has been transmitted by a satellite.

[Sub-s. (2A) inserted by s. 2 (d) of Act 125 of 1992.]

(3) A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.

3 Copyright by virtue of nationality, domicile or residence, and duration of copyright

(1) Copyright shall be conferred by this section on every work, eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is at the time the work or a substantial part thereof is made, a qualified person, that is-

(a) in the case of an individual, a person who is a South African citizen or is domiciled or resident in the Republic; or

(b) in the case of a juristic person, a body incorporated under the laws of the Republic:

Provided that a work of architecture erected in the Republic or any other artistic work incorporated in a building or any other permanent structure in the Republic, shall be eligible for copyright, whether or not the author was a qualified person.

[Sub-s. (1) substituted by s. 3 (a) of Act 125 of 1992.]

(2) The term of copyright conferred by this section shall be, in the case of-

(a) literary or musical works or artistic works, other than photographs, the life of the author and fifty years from the end of the year in which the author dies: Provided that if before the death of the author none of the following acts had been done in respect of such works or an adaptation thereof, namely-

(i) the publication thereof;

(ii) the performance thereof in public;

(iii) the offer for sale to the public of records thereof;

(iv) the broadcasting thereof;

the term of copyright shall continue to subsist for a period of fifty years from the end of the year in which the first of the said acts is done;

[Para. (a) amended by s. 3 (a) of Act 52 of 1984.]

(b) cinematograph films, photographs and computer programs, fifty years from the end of the year in which the work-

(i) is made available to the public with the consent of the owner of the copyright; or

(ii) is first published,

whichever term is the longer, or failing such an event within fifty years of the making of the work, fifty years from the end of the year in which the work is made;

[Para. (b) substituted by s. 3 (b) of Act 125 of 1992 and by s. 52 of Act 38 of 1997.]

(c) sound recordings, fifty years from the end of the year in which the recording is first published;

(d) broadcasts, fifty years from the end of the year in which the broadcast first takes place;

(e) programme-carrying signals, fifty years from the end of the year in which the signals are emitted to a satellite;

(f) published editions, fifty years from the end of the year in which the edition is first published.

[Para. (f) added by s. 3 (b) of Act 52 of 1984.]

(3) (a) In the case of anonymous or pseudonymous works, the copyright therein shall subsist for fifty years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter.

[Para. (a) substituted by s. 3 (c) of Act 125 of 1992.]

(b) In the event of the identity of the author becoming known before the expiration of the period referred to in paragraph (a), the term of protection of the copyright shall be calculated in accordance with the provisions of subsection (2).

(4) In the case of a work of joint authorship the reference in the preceding subsections to the death of the author shall be taken to refer to the author who dies last, whether or not he is a qualified person.

4 Copyright by reference to country of origin

(1) Copyright shall be conferred by this section on every work which is eligible for copyright and which-

- (a) being a literary, musical or artistic work or a sound recording, is first published in the Republic;
- (b) being a broadcast, is made in the Republic;
- (c) being a programme-carrying signal, is emitted to a satellite from a place in the Republic;
- (d) being a cinematograph film, is first published or made in the Republic;
- (e) being a published edition, is first published in the Republic;
- [Para. (e) added by s. 4 (b) of Act 52 of 1984.]
- (f) being a computer program, is first published or made in the Republic,
- [Para. (f) inserted by s. 4 of Act 125 of 1992.]

and in respect of which copyright is not conferred by section 3.

(2) Copyright conferred on a work by this section shall be subject to the same term of copyright provided for in section 3 for a similar work.

5 Copyright in relation to the state and certain international organizations

(1) This Act shall bind the state.

(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organizations as may be prescribed.

(3) Copyright conferred by this section on a literary or musical work or an artistic work, other than a photograph, shall subsist for fifty years from the end of the year in which the work is first published.

(4) Copyright conferred by this section on a cinematograph film, photograph, sound recording, broadcast, programme-carrying signal, published edition or computer program shall be subject to the same term of copyright provided for in section 3 for a similar work.

[Sub-s. (4) substituted by s. 5 of Act 52 of 1984 and by s. 5 of Act 125 of 1992.]

(5) Section 3 and 4 shall not confer copyright on works with reference to which this section applies.

(6) Copyright which vests in the state shall for administrative purposes be deemed to vest in such officer in the public service as may be designated by the State President by proclamation in the *Gazette*.

6 Nature of copyright in literary or musical works

Copyright in a literary or musical work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the work in any manner or form;
- (b) publishing the work if it was hitherto unpublished;
- [Para. (b) substituted by s. 6 of Act 125 of 1992.]
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
- [Para. (e) substituted by s. 3 (b) of Act 56 of 1980.]
- (f) making an adaptation of the work;
- (g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.
- [S. 6 amended by s. 3 (a) of Act 56 of 1980.]

7 Nature of copyright in artistic works

Copyright in an artistic work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the work in any manner or form;
- (b) publishing the work if it was hitherto unpublished;
- [Para. (b) substituted by s. 7 of Act 125 of 1992.]
- (c) including the work in a cinematograph film or a television broadcast;
- (d) causing a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;
- [Para. (d) substituted by s. 4 (b) of Act 56 of 1980.]
- (e) making an adaptation of the work;
- (f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (d) inclusive.
- [S. 7 amended by s. 4 (a) of Act 56 of 1980.]

11A Nature of copyright in published editions

Copyright in a published edition vests the exclusive right to make or to authorize the making of a reproduction of the edition in any manner.

[S. 11A inserted by s. 8 of Act 52 of 1984.]

12 General exceptions from protection of literary and musical works

- (1) Copyright shall not be infringed by any fair dealing with a literary or musical work-
- (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
 - (b) for the purposes of criticism or review of that work or of another work; or
 - (c) for the purpose of reporting current events-
 - (i) in a newspaper, magazine or similar periodical; or
 - (ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

[Sub-s. (1) amended by s. 11 (a) and (b) of Act 125 of 1992.]

(2) The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.

(3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(5) (a) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work.

(b) Any reproduction of a work made under paragraph (a) may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work.

[Sub-s. (5) substituted by s. 54 of Act 38 of 1997.]

(6) (a) The copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose.

(b) The author of a lecture, address or other work referred to in paragraph (a) shall have the exclusive right of making a collection thereof.

(7) The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.

(8) (a) No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.

(b) The author of the speeches referred to in paragraph (a) shall have the exclusive right of making a collection thereof.

(9) The provisions of subsections (1) to (7) inclusive shall apply also with reference to the making or use of an adaptation of a work.

[Sub-s. (9) substituted by s. 11 (c) of Act 125 of 1992.]

(10) The provisions of subsections (6) and (7) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

[Sub-s. (10) substituted by s. 11 (d) of Act 125 of 1992.]

(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.

(12) The copyright in a literary or musical work shall not be infringed by the use thereof in a *bona fide* demonstration of radio or television receivers or any type of recording equipment or playback equipment to a client by a dealer in such equipment.

[Sub-s. (12) substituted by s. 11 (e) of Act 125 of 1992.]

(13) An authorization to use a literary work as a basis for the making of a cinematograph film or as a contribution of a literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film.

[Sub-s. (13) added by s. 11 (f) of Act 125 of 1992.]

15 General exceptions from protection of artistic works

(1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.

(2) The copyright in a work of architecture or in the relevant drawings shall not be infringed by the reconstruction of that work on the same site in the same style as the original.

(3) The copyright in an artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such work is permanently situated in a street, square or a similar public place.

(3A) (a) The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as authorized reproductions), shall not be infringed if any person without the consent of the owner makes or makes available to the public three-dimensional reproductions or adaptations of the authorized reproductions, provided-

(i)

[Sub-para. (i) deleted by s. 2 (1) (a) of Act 13 of 1988.]

(ii) the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process.

(b)

[Para. (b) deleted by s. 2 (1) (b) of Act 13 of 1988.]

[Sub-s. (3A) inserted by s. 2 of Act 66 of 1983.]

(4) The provisions of section 12 (1), (2), (4), (5), (9), (10), (12) and (13) shall *mutatis mutandis*, in so far as they can be applied, apply with reference to artistic works.

[Sub-s. (4) substituted by s. 13 of Act 125 of 1992.]

19A General exceptions regarding protection of published editions

The provisions of sections 12 (1), (2), (4), (5), (8), (12) and (13) shall *mutatis mutandis* apply with reference to published editions.

[S. 19A inserted by s. 9 of Act 52 of 1984 and substituted by s. 17 of Act 125 of 1992.]

20 Moral rights

(1) Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorizes the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.

(2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2, and for the purposes of the provisions of the said Chapter the author shall be deemed to be the owner of the copyright in question.

[S. 20 substituted by s. 19 of Act 125 of 1992.]

21 Ownership of copyright

(1) (a) Subject to the provisions of this section, the ownership of any copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.

(b) Where a literary or artistic work is made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.

(d) Where in a case not falling within either paragraph (b) or (c) a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(e) Paragraphs (b), (c) and (d) shall in any particular case have effect subject to any agreement excluding the operation thereof and subject to the provisions of section 20.

(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international organization concerned, and not in the author.

[S. 21 substituted by s. 9 of Act 56 of 1980.]

CHAPTER 2

INFRINGEMENTS OF COPYRIGHT AND REMEDIES (ss 23-28)

23 Infringement

(1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorize.

[Sub-s. (1) substituted by s. 20 (a) of Act 125 of 1992.]

(2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work-

(a) imports an article into the Republic for a purpose other than for his private and domestic use;

(b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article;

(c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or

(d) acquires an article relating to a computer program in the Republic,

[Para. (d) inserted by s. 20 (b) of Act 125 of 1992.]

if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.

(3) The copyright in a literary or musical work shall be infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work: Provided that this subsection shall not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright.

(4)

[Sub-s. (4) deleted by s. 20 (c) of Act 125 of 1992.]

24 Action by owner of copyright for infringement

(1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.

[Sub-s. (1) substituted by s. 21 (a) of Act 125 of 1992.]

PATENTS ACT 57 OF 1978

CHAPTER V

APPLICATIONS FOR PATENTS (ss 25-43)

25 Patentable inventions

(1) A patent may, subject to the provisions of this section, be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture.

(2) Anything which consists of-

- (a) a discovery;
- (b) a scientific theory;
- (c) a mathematical method;
- (d) a literary, dramatic, musical or artistic work or any other aesthetic creation;
- (e) a scheme, rule or method for performing a mental act, playing a game or doing business;
- (f) a program for a computer; or
- (g) the presentation of information,

shall not be an invention for the purposes of this Act.

(3) The provisions of subsection (2) shall prevent, only to the extent to which a patent or an application for a patent relates to that thing as such, anything from being treated as an invention for the purposes of this Act.

(4) A patent shall not be granted-

- (a) for an invention the publication or exploitation of which would be generally expected to encourage offensive or immoral behaviour; or
- (b) for any variety of animal or plant or any essentially biological process for the production of animals or plants, not being a micro-biological process or the product of such a process.

(5) An invention shall be deemed to be new if it does not form part of the state of the art immediately before the priority date of any claim to that invention.

[Sub-s. (5) substituted by s. 31 (a) of Act 38 of 1997.]

(6) The state of the art shall comprise all matter (whether a product, a process, information about either, or anything else) which has been made available to the public (whether in the Republic or elsewhere) by written or oral description, by use or in any other way.

(7) The state of the art shall also comprise matter contained in an application, open to public inspection, for a patent, notwithstanding that that application was lodged at the patent office and became open to public inspection on or after the priority date of the relevant invention, if-

- (a) that matter was contained in that application both as lodged and as open to public inspection; and
- (b) the priority date of that matter is earlier than that of the invention.

[Sub-s. (7) substituted by s. 31 (b) of Act 38 of 1997.]

(8) An invention used secretly and on a commercial scale within the Republic shall also be deemed to form part of the state of the art for the purposes of subsection (5).

(9) In the case of an invention consisting of a substance or composition for use in a method of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body, the fact that the substance or composition forms part of the state of the art immediately before the priority date of the invention shall not prevent a patent being granted for the invention if the use of the substance or composition in any such method does not form part of the state of the art at that date.

[Sub-s. (9) substituted by s. 31 (c) of Act 38 of 1997.]

(10) Subject to the provisions of section 39 (6), an invention shall be deemed to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms, immediately before the priority date of the invention, part of the state of the art by virtue only of subsection (6) (and disregarding subsections (7) and (8)).

[Sub-s. (10) substituted by s. 31 (d) of Act 38 of 1997.]

(11) An invention of a method of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body shall be deemed not to be capable of being used or applied in trade or industry or agriculture.

(12) Subsection (11) shall not prevent a product consisting of a substance or composition being deemed to be capable of being used or applied in trade or industry or agriculture merely because it is invented for use in any such method.

27 Who may apply for a patent

- (1) An application for a patent in respect of an invention may be made by the inventor or by any other person acquiring from him the right to apply or by both such inventor and such other person.
- (2) In the absence of an agreement to the contrary, joint inventors may apply for a patent in equal undivided shares.

CHAPTER VI

GRANT, DURATION AND EFFECT OF PATENTS (ss 44-49)

44 Granting and sealing of patent

- (1) As soon as practicable after the publication contemplated in section 42, a patent in the form prescribed shall be granted to the applicant, and the registrar shall cause the patent to be sealed with the seal of the patent office, and such sealing shall be deemed to have been effected on the date of that publication.
- (2) The date on which that sealing is so deemed to have been effected shall for the purposes of this Act be the date of the sealing of the patent.
- (3) The patent shall have effect from the date of the publication mentioned in subsection (1).
- (4) No proceedings for the infringement of a patent shall be instituted within a period of nine months from the date of the sealing thereof: Provided that the commissioner may, on good cause shown, grant leave to institute such proceedings at any time after the date of the sealing of the patent.

CHAPTER X

REVOCAION OF PATENTS (ss 61-64)

61 Grounds for application for revocation of patent

- (1) Any person may at any time apply in the prescribed manner for the revocation of a patent on any of the following grounds only, namely-
- (a) that the patentee is not a person entitled under section 27 to apply for the patent;
 - (b) that the grant of the patent is in fraud of the rights of the applicant or of any person under or through whom he claims;
 - (c) that the invention concerned is not patentable under section 25;
 - (d) that the invention as illustrated or exemplified in the complete specification concerned cannot be performed or does not lead to results and advantages set out in the complete specification;
 - (e) that the complete specification concerned does not sufficiently describe, ascertain and, where necessary, illustrate or exemplify the invention and the manner in which it is to be performed in order to enable the invention to be carried out by a person skilled in the art of such invention;
[Para. (e) substituted by s. 12 of Act 58 of 2002.]
 - (f) that the claims of the complete specification concerned are not-
 - (i) clear; or
 - (ii) fairly based on the matter disclosed in the specification;
 - (g) that the prescribed declaration lodged in respect of the application for the patent contains a false statement or representation which is material and which the patentee knew to be false at the time when the declaration was made;
 - (h) that the application for the patent should have been refused in terms of section 36;
 - (i) that the complete specification claims as an invention a microbiological process or a product thereof and that the provisions of section 32 (6) have not been complied with.

- (2) An application for revocation shall be served on the patentee and lodged with the registrar in the prescribed manner and shall thereafter be dealt with in the manner prescribed.
- (3) The commissioner shall decide whether the patent shall be revoked or whether and, if so, subject to what amendments, if any, of the specification or claims thereof, the patent shall be upheld: Provided that the commissioner shall not allow any amendment which is in conflict with the provisions of section 51 (6) or (7): Provided further that the commissioner may in the exercise of his discretion as to costs take into consideration the conduct of the patentee in framing his specification and claims and permitting them to remain as so framed.

CHAPTER XI

INFRINGEMENT (ss 65-71)

65 Proceedings for infringement

- (1) Subject to the provisions of section 53 (3), proceedings for infringement of a patent may be instituted by the patentee.

[Sub-s. (1) substituted by s. 13 of Act 58 of 2002.]

- (2) Proceedings for infringement shall be instituted and prosecuted in the manner prescribed.
- (3) A plaintiff in proceedings for infringement shall be entitled to relief by way of-
- (a) an interdict;
 - (b) delivery up of any infringing product or any article or product of which the infringing product forms an inseparable part; and
 - (c) damages.
- [Sub-s. (3) substituted by s. 3 (a) of Act 76 of 1988.]
- (4) In any proceedings for infringement the defendant may counterclaim for the revocation of the patent and, by way of defence, rely upon any ground on which a patent may be revoked.
- (5) The plaintiff in any such proceedings shall, before he institutes the proceedings, give notice thereof to every licensee under the patent in question whose name is recorded in the register, and any such licensee shall be entitled to intervene as a co-plaintiff.
- [Sub-s. (5) substituted by s. 3 (b) of Act 76 of 1988.]
- (6) In lieu of damages the plaintiff may, at his or her option, be awarded an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee or sub-licensee in respect of the patent concerned.
- [Sub-s. (6) added by s. 3 (c) of Act 76 of 1988 and substituted by s. 46 of Act 38 of 1997]

66 Restriction on recovery of damages for infringement

- (1) A patentee shall not be entitled to recover damages in respect of infringement of a patent from a defendant who proves that at the date of the infringement he was not aware, and had no reasonable means of making himself aware, of the existence of the patent, and the marking of an article with the word 'patent' or 'patented' or any word or words expressing or implying that a patent has been obtained for the article, stamped, engraved, impressed on or otherwise applied to the article, shall not be deemed to constitute notice of the existence of the patent unless such word or words are accompanied by the number of the patent: Provided that nothing in this section shall affect any proceedings for an interdict.
- (2) Any person who represents that any invention is patented, without such representation disclosing the number of the patent concerned, and from whom the number of such patent has been requested in writing by registered post by any other person unaware of such number, may not recover from such other person damages, or obtain an interdict against him, in respect of any infringement of such patent by such other person, committed during the period commencing with the representation and terminating two months after the date on which such other person was notified in writing by the first-mentioned person of the number of the patent concerned.
- (3) Any person who, having made a request referred to in subsection (2), expends during the period referred to in that subsection any money, time or labour with a view to making, using, exercising, offering to dispose of, disposing of or importing the invention, may apply in the manner prescribed to the commissioner for compensation in respect of the money, time or labour reasonably so expended, and the commissioner may issue such order as he or she may deem fit.
- [Sub-s. (3) substituted by s. 14 of Act 58 of 2002.]
- (4) If proceedings are instituted in respect of infringement of a patent, committed after the failure to pay any prescribed renewal fee within the prescribed period, and before any extension of the period for such payment, the commissioner may, if he thinks fit, refuse to award any damages in respect of the infringement.
- (5) Where an amendment of a specification has been allowed under section 51, the commissioner may in his discretion refuse to award damages in respect of any acts of infringement committed before that amendment was so allowed and, in exercising his discretion, the commissioner may take into consideration the conduct of the patentee in framing the specification and permitting it to remain in its unamended form.