

LML4801

October/November 2012

PATENT AND COPYRIGHT LAW

Duration 2 Hours

100 Marks

EXAMINERS :FIRST
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Closed book examination.

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This paper consists of 3 pages

- **ANSWER BOTH QUESTION 1 AND QUESTION 2.**
- **Note the division of marks and use the available time accordingly.**
- **Refer to applicable legislation and case law when answering the questions.**

QUESTION 1: PATENT LAW

The following scenario applies to QUESTION 1:

The Kamfers Dam flamingos

Kamfers Dam is situated north of Kimberley in South Africa's Northern Cape province. It is one of only six places in the world where the lesser flamingo breeds, and its only breeding place in South Africa.

Until recently visitors to Kimberley were welcomed by a sight of up to 80 000 of these birds. A combination of increasing water levels (due to higher rainfall) and poor water quality have reduced their numbers to around 500

The poor water quality is caused by badly treated sewage from a dysfunctional sewage works that is flooding into the dam. It will cost more than R200 million to upgrade the sewage works so that the city's waste water can be treated to an acceptable standard before it flows into Kamfers Dam

Assume that Jake, an engineer employed by the local municipality, invents a fast and inexpensive process for turning biosolids into an enriched organic fertiliser with a high commercial value. Clean water will flow into Kamfers Dam and the municipality will save on the costs - and pollution risks - of land disposal of solid waste. To build a plant that incorporates Jake's invention will cost only R10 million, and the income from the fertiliser will pay for the running costs of the sewage works

- (a) Jake tells his friend, Chris, who is also an engineer, about his (Jake's) invention. Discuss the possibility that, by talking to Chris, Jake may have destroyed the novelty of his invention (10)
- (b) Jake's patent is a huge success and other engineers are invited to visit the plant. They usually say something like "It is so simple. You just have to do this here. and change that there.... We could have thought of this ourselves!" Does this mean that the patent can be revoked because it is obvious? (15)
- (c) Does the invention belong to Jake or to his employer (the municipality)? (10)
- (d) A process that is similar to Jake's invention was patented earlier in South Africa in 2009. Jake is concerned that his process would infringe this patent. Explain to him how patent infringement is established in terms of South African law. (15)
- [50]**

QUESTION 2: COPYRIGHT LAW

The following scenario applies to QUESTION 2:

The Kamfers Dam flamingos (continue)

Elaine is employed as photographer by Conservation Media, the owners of *Nature First* magazine. As the feature article of the next issue of *Nature First* will be dedicated to the lesser flamingo, Conservation Media sends Elaine on a tour of the lesser flamingo breeding sites in Africa. They further commission Rachel, a freelance writer, to accompany Elaine on this tour and to write the text of the article

Rachel and Elaine visit Kamfers Dam, Lake Natron in Tanzania, Etosha Pan in Namibia, and the Sua Pan in Botswana. In an archive in Kimberley Rachel finds a field note book that someone kept about the flamingos at Kamfers Dam, but there is no indication as to when and by whom it was written. The archivist describes it as an 'orphan work'.

The article has to be ready when they return to Johannesburg. On the last night of their expedition, Rachel tells Elaine that she has not written anything yet. As Elaine's annual bonus depends on the success of the flamingo article, she decides to help Rachel. They work together on the article. Rachel does all the typing on her laptop computer and saves back-up copies of the finished article as well as copies of Elaine's photos on a flash disk. By sunrise the article is ready.

On Elaine and Rachel's return to Johannesburg, Lita, a rival journalist who works for *Out There* magazine, steals Rachel's flash disk from her back pack.

Elaine and Rachel are very pleased when their article is published in the November 2012 edition of *Nature First* magazine, under the title *The Lesser Flamingo Breeding Sites on the African Continent*. They are astonished, however, to discover a similar article appearing in the November 2012 issue of *Out There*. The authors of the *Out There* article are listed as Lita, Elaine, and Rachel!

- (a) What copyright hurdles would Rachel face if she wants to use the field note book for her article? (10)
- (b) Who are the authors and the first copyright owners of -
• the photographs,
• the text; and
• the page layout
of *The Lesser Flamingo Breeding Sites on the African Continent*? (20)
- (c) Did Lita infringe the copyright in the works created by Rachel and Elaine? In your answer you have to refer to the following:
• whether the works saved on the flash disk meet the requirement of 'material form';
• the relevant exclusive right(s) of the copyright owner(s);
• direct and indirect infringement of copyright;
• whether the fact that Lita named Elaine and Rachel as co-authors would excuse infringement; and
• whether copyright can subsist in the article in *Out There*. (20)
- [50]

TOTAL:[100]