

南アフリカの模倣業者に関する 調査

[著者] ADAMS & ADAMS

[編者] 独立行政法人 日本貿易振興機構

2013年3月発行 禁無断転載

日本貿易振興機構 (ジェトロ)

※本レポートは、経済産業省委託事業の一環として作成しております。

1. はじめに

a. 知的財産権の種類(商標権、著作権、特許権、意匠権)

- 南アフリカでは各種の知的財産権が認められている。特に、南アフリカの法律は商標、著作権、特許権、意匠権、植物育成者権を保護している。コモン・ローでも特定の権利が認められているが、これらは模倣品禁止とはほとんど無関係である。
- 商標権は、南アフリカでの商標の使用事実に基づくコモン・ロー上の権利、または「1993 年第 194 号法律商標法」（「商標法」）に基づく登録により生じる制定法上の権利として取得される。商標法では、著名商標であれば、登録されていなくても保護される旨の規定がある。
- 南アフリカでは、著作権は一定の要件を満たせば自動的に付与され、著作権所有者が保護を受けるために登録する必要はない。ただし、映画フィルムについては著作権登録が認められている。
- 南アフリカの特許権は世界の他の多くの国とほぼ同じ方法で取得することが可能である。ただし、当該製品が模倣品に該当するかの判断にあたっては特許保護の有無は考慮されない。事実、「1997 年法律第 37 号模倣品取締法」（「模倣品取締法」）は特許権侵害を理由とする押収を認めていない。

- 特許と類似して、登録意匠権(世界の他の地域で意匠特許または実用新案と呼ばれている)を南アフリカで取得することができるが、模倣品取締法による保護は受けられない。登録意匠は、模倣品取締法による撤去または押収の根拠とはならない。

b. 模倣の一般的定義と理解、侵害の種類と形式

模倣品は模倣品取締法第 1 条第(1)項第(v)号に定義されており、模倣の結果として生じた物品とされている。模倣の定義は下記の通りである。

- 南アフリカ共和国または他の地域において、南アフリカの保護品(すなわち真正品)について存在する知的所有権の所有者の許可なく、製造された物品が保護対象品と実質的に同一の模倣となるような態様および程度により、物品の製造、生産、製作を行なうこと。または
- 南アフリカまたは他の地域において、南アフリカの保護品に関する商標または著作権の対象物あるいはこれらの偽造物の製造、生産または適用を行い、当該物品を保護品あるいは知的財産権所有者から許諾を受けた物品であると混同させあるいは誤解させること。または
- 南アフリカまたは他の地域において、商品表示法により禁止された商標を権限なく製造しまたは適用すること。

模倣品取締法により、知的財産権所有者は民事および/または刑事手続で模倣業者に迅速かつ有効に対応することが可能である。模倣品取締法の適用上、知的財産は下記のように定義されている。

- 商標法により付与される商標権

- 1978 年法律第 98 号著作権法（「著作権法」）に定める著作物、または

- 1941 年法律第 17 号商品表示法（「商品表示法」）第 15 条に基づいて発行された通達に記載される特定の表示を使用する権利。このような標章は、通常「禁止対象標章」と呼ばれる。

上記のように、特許権または登録意匠の侵害品は、模倣品取締法が定義する模倣品には該当しないことに注意すべきである。

2. 南アフリカでの模倣品製造状況

a. 南アフリカで模倣の被害を受けているのは主としてどの部門、どの製品か?

南アフリカで模倣の被害が最も大きいのは衣類および繊維産業並びに音楽・映画/DVD 産業であることは疑いない。当事務所の推定によれば、南アフリカで押収された模倣品の約 50%~60%がこれらの部門に属している。しかし、他の産業も

影響を受けていないわけではない。子供玩具は模倣品の輸入業者および製造業者のターゲットになることが少なくなく、医薬品や携帯電話、テレビ、時計などの電子機器も同様である。また、一般的商品だけでなく、自動車用オイル、ミシン、個人衛生用品（おむつやカミソリの刃）、自転車、採掘用具などの特殊品も増加している。自動車部品など、安全上重要な物品も南アフリカに輸入され、販売されている。

b. 模倣全般、特に南アフリカでの模倣の主な誘因は何か？

南アフリカの消費者は向上心が強いが、常に真正品を購入できる立場にはない。従って、南アフリカで模倣品への需要がある原因の1つは価格にあると考えられる。人口の多くを失業者が占めている一方で、ブランド服を着て高級オートバイに乗り、地域社会でのステータスを高めるものを持っていたいという欲求は強い。

小さな町や田舎では真正品が買えないことも要因の1つである。これらの地域の住人は真正品が購入できる都会にいつも行けるわけではないからである。

最後に、南アフリカの雇用率の低さおよびジンバブエ、ソマリア、エチオピア、ナイジェリアなどの国からの違法移民が増加を続けていることから、正規雇用を得られない者が模倣品市場を形成している。所得を得る唯一の方法が非正規市場での模倣品販売ということも多い。

c. 模倣品はどのようにして南アフリカの正規市場、非正規市場に流通しているのか?

従来、南アフリカ市場の模倣品は非正規市場からの供給、例えば露天商人、非正規市場（南アフリカでは蚤の市と呼ばれている）、ロコミ販売によるものが主流であった。しかし、正規市場底辺部の低価格卸業者がこれらの製品を販売することが増えている。インターネット販売も増加しているが、模倣品の販売は現在もなお、市場が中心である。

このような市場には、チャイナ・モール（各種小売店の集合施設）、ドラゴン・シティ、モンタナ・トレーダー、ベルビル・ステーション、ホイール・イン・ダーバンその他多数が存在する。

散発的ではあるが、高級販売店での模倣品の販売事件もある。ただし、その多くで、店は模倣品と知らずに販売していた。

d. 最終目的地はどこか? 南アフリカへの輸入かそれともアフリカへの再輸出か?

ほとんどの場合、模倣品の最終目的地は南アフリカである。ただし、南アフリカはアフリカ南部諸国への物品輸入の主窓口となっている。そのため、多数の模倣品が南アフリカを通過してアフリカ南部諸国に流れている。残念ながら南アフリカの判例法では、南アフリカで積み替えられる物品を税関その他の当局が差し押さ

えあるいは押収することができない。南アフリカへの模倣品輸入業者はこの抜け穴を利用して通関している。ただしこれらの物品が南アフリカを出ることはなく、最終的に国内市場に流入する。

南アフリカで積み替えられた物品の行き先はナミビア、アンゴラ、ボツワナ、モザンビーク、レソト、スワジランド、ザンビアである。タンザニアやさらにはケニアへ送付途中の物品が発見されたこともある。

e. アフリカに再輸出される製品は主として何か?

アフリカに再輸出される製品は衣類、繊維、子供玩具、医薬品、個人用衛生用品が中心である。

f. 模倣品の販売が多い南アフリカの都市はどこか?

南アフリカに輸入された模倣品の大半はヨハネスブルグに送られる。ヨハネスブルグから他の南アフリカの都市や町に送られるのである。その結果、模倣品の多くはヨハネスブルグで発見されており、ダーバン、ケープ・タウンなどの大都市がこれに続く。ポート・エリザベス、イースト・ロンドン、キンバリー、ルステンブルグ、アピントン、ブルームフォンテーンなどの小都市も模倣品の販売が集中していることで知られる。比較的最近の傾向として、ヨハネスブルグをはじめとする大都市での継続的な取締りの結果、模倣品は大都市周辺のブリッツ、フェ

リーニヒング、ボックスバーグ（ヨハネスブルグ郊外）、ピーターマリッツバーグ（ダーバン郊外）、ベルビル（ケープタウン郊外）や上記のキンバリー、アピントン、イースト・ロンドンなどの小都市に流れていることが分かった。

g. 日本製品を含め、南アフリカの模倣品にはどのようなものがあるか

- ゲーム機、コンピューター、コンピューター周辺機器、メモリー・カード、プリンター・カートリッジ、プリンター付属品などの電子機器

- 音響機器および CD/DVD プレイヤー

- 自動車用スペア部品および交換部品

- 靴、衣類、スポーツ用品

h. 輸入および再輸出されている模倣品はどのような性質のものか、部品なのか最終製品なのか

ほとんどの場合、模倣品は最終製品として南アフリカに輸入されている。ただし、税関による模倣品の摘発、留置、押収が強化されるにつれ、部品として輸入する輸入業者が増えている。これは特に電子機器（中でも携帯電話）および衣類に多く、これらの製品は商標なしで輸入されて輸入通関の後に商標が付けられている。

➤ 模倣品製造国-模倣品の主な製造国はどこか？

- 現在のところ、南アフリカに輸入される模倣品の最大の製造国は中国である。シンガポールやドバイ経由での輸入が多い。タイやパキスタンでも模倣品が製造されているが中国より少ない。南アフリカ製の模倣品はほとんどない。南アフリカ製の模倣品の好例が粉石けんと粉末カレーである。箱は南アフリカで印刷され、安物の石鹼や粉末カレーが入れられて模倣品となる。自動車用オイル、グリース、防腐剤も同様である。

➤ 正規品と比較した品質、数量、価格

- 模倣品の品質は一般的に正規品より劣る。ほとんどの場合、きわめて劣る。ただし、模倣品の品質は年々上がっている。輸入模倣品のほうが、商標権を有するメーカーが国内生産したものより品質が高かったという例があった。

- 南アフリカに輸入される模倣品の数量および国内市場での販売数量を正確に述べることは極めて難しい。当事務所の顧客で模倣品による大きな問題を抱えている顧客の推定によれば、南アフリカで製造販売される真正品 1 つにつき模倣品 1 つが輸入販売されている。残念ながら、国内市場での模倣品を正確に推定することは事実上不可能である。

○

3. 模倣品および正規品に対する消費者の態度や認識はどうか?

a. 模倣品に対する市場の反応はどうか?

残念ながら、南アフリカ市場は模倣品に比較的寛容である。特に、消耗品であるマッチ、カミソリの刃やおむつなどの個人衛生用品、電池、衣類、靴、CD、DVD がそうである。自動車オイル、ゴルフ用品、電気部品、自動車部品などの「高級な製品」については消費者が模倣品であることを知らずに購入していることが少なくない。このような場合、模倣品あるいは粗悪品であることを知っていれば消費者は買わなかったと考えられる。このことは模倣品医薬品にもあてはまる。

残念なことに、消耗品、衣料などについては、粗悪品であること、真正品ほどの寿命がないこと、国内経済に悪影響があることを承知の上で購入されている。こうした消費者は、真正品の入手が可能でも高すぎて購入できないという場合が多い。

b. **正規品に比較して市場での売れ行きはどうか?**

ほとんどの模倣品は低価格であることから、国内市場でよく売れている。税関および警察当局による取締は常時厳しく行われており、模倣品の輸入業者および販売業者は当局の押収による在庫不足に直面することがよくある。それにもかかわらず、正規市場、非正規市場で多量の模倣品が販売されている。しかし、真正品の売上高は模倣品を上回っていると当事務所は推定している。

c. **消費者は自分が（異なったブランドの製品の）模倣品を購入していることを知っているのか?**

消費者は模倣品であることを知りながら購入している場合もある。特に、衣類、DVD、CD や消耗品がそうである。機械類、自動車オイル、ゴルフ用品、電気部品、自動車部品、アクセサリなどについては模倣品であることを知らずに消費者が購入している場合もある。

4. **模倣品によりどのような影響を受けているか?**

a. 模倣品は消費者、企業、政府にどのような問題を引き起こしているか?

模倣品は消費者、企業、政府に膨大な額の損害を与えている。

消費者に関しては、消費者が購入する粗悪品はアフターサービスやサポートがないことが多い。南アフリカの消費者保護法は非常に進んでいるが、模倣品業者を取り締まることができない場合が多く、また非正規市場で商売をしているため、取締が難しい。従って消費者は（安価ではあるが）真正品より著しく品質が劣り、取締が保証されず、保証の対象にもならない製品にお金を払っていることになる。このような消費者には、真正品が買えないにもかかわらず所得の大半を新しい携帯電話、テレビ、自動車部品などにつぎ込む低所得者が非常に多い。

企業への損害も甚大である。南アフリカでの模倣品販売により売上が減少するのみならず、ブランド価値、のれん及び評判も低下する。このような事態は、特に、消費者が真正品と信じて模倣品を購入した場合に生じる。模倣品に問題が生じた場合、このような消費者は真正品の性能が悪いと考えてしまう。繊維業界は安い模倣品の輸入販売により大打撃を受けた。

模倣品の輸入、製造、販売による政府の損害は、主に輸入業者、製造業者、販売業者は政府に事業や所得の申告をしないという事実による。これらの製品は関税回避のため虚偽申告により輸入されることが多い。また、購入に対する付加価値

税が納入されず、所得税にかかわる販売所得も申告されない。従って、政府の損害は関税および所得税の損失が主である。また、政府の模倣品への対応が不十分であれば業界が損害を受けることから、業界団体および消費者団体の評価が下がる。その良い例が南アフリカの繊維製造産業であり、中国その他の国からの安価な模倣品の輸入によりほぼ壊滅状態にある。衣料や繊維などの産業が損害を受ければ南アフリカの就労人口が減少し、このことが南アフリカ政府の大きな問題となっている。

- b. 上記のカテゴリーで最も損害規模が大きいのはどれか。どの部門の損害が最も重大か?

消費者、企業、政府の損害規模を推定することはほぼ不可能である。その主な原因は、問題の規模を政府が把握していないことにある。南アフリカで押収された模倣品数に関する最新データの入手は困難であるが、貿易産業省および南アフリカ国税庁の古いデータによれば問題の程度は下記の通りである。

- 販売されているソフトウェアの%が模倣品と推定される(2009)。

- 2009年の独立開発公社の推定では、4年間で海賊版ソフトウェアが10%減少すれば、60億ランドの売上増となり、付加価値税収入が4億8000万ランド増える。

- 貿易産業省の 2008 年の推定によれば、模倣品による年間収益損失は 20 億ランドにのぼる。その後、この数字は 3 倍になったと当事務所は推定している。
- 2009 年だけでも、南アフリカ著作権窃盗反対連盟からの申立てで 400 件が起訴された。
- 2012 年 3 月を末とする 1 年間に、税関は 7 348 937 個の模倣品を押収し、これにより保護された額は 11 億ランドと推定される。
- 2012 年 3 月を末とする 1 年間について、南アフリカ警察庁が公表した模倣品関連データは下記の通りである。
 - 逮捕: 272
 - 有罪判決(Conviction): 183
 - 有罪評決(Guilty verdict): 447
 - 押収価額 ± 2 億 3200 万ランド

上記のほか、南アフリカ市場で押収された物品数は大海の一滴にすぎないと考えられている。南アフリカ税関は入国する貨物の 5%を検査できるにすぎず、多数の模倣品が税関の網をくぐり抜けている。また、警察による模倣品取締も大都市および中都市が中心であり、小さな町での模倣品の規模を測定することはほぼ不可能である。

上記に述べた通り、経験に基づき、南アフリカの衣料および繊維業界および国内音楽業界への損害は甚大であると考えられる。

5. 模倣品の規制環境

a. 模倣品に対する政府方針（方針手続）は何か？

以上のように、政府は模倣品への取り組みをサポートしている。積極的な立法（模倣品取締法）が制定され、警察、貿易産業省、税関、税務当局（南アフリカ国税庁）が模倣品の押収を行なっている。模倣品取締法の特定の条項に関する問題点、さらに、高等裁判所判決によって生じた問題点が指摘されているが、これらに対する政府の優先度は高くない。

2004年、南アフリカ知的財産法研究所(SAIPL)が貿易産業省に対し、模倣品取締法の差押および押収に関連する模倣品取締法その他の法令を改正するよう勧告した。現在まで、知的財産法に関連するすべての法令の全面的改正は議論されているが、模倣品取締法の改定は検討されていない。従って、模倣品の捜索・押収に対する強い政治的意思はあるものの、傍らに押しやられていることになる。その結果、いくつかの抜け穴が作り出され、比較的低リスクでの模倣品の南アフリカへの輸入及び製造が可能になっている。

b. 模倣品を規制する法律は何か？ 該当する条文は何か

模倣品取締法は模倣品の差押、捜査、押収、廃棄についての規定で構成されている。同法を**附属書“B1”**に添付している。模倣品取締法をサポートする法律に「商標法」、「著作権法」、「商品表示法」、「関税および間接税に関する法」がある。「商標法」、「著作権法」、「商品表示法」（改正版）をそれぞれ**附属書“B2”**、**“B3”**、**“B4”**として添付している。「関税および間接税に関する法」は量が多いため添付していない。この法律のコピーが必要であれば提供する。ただし「関税および間接税に関する法」で最も関連性が高い条文は第 88 条第(1)項第(a)号および第 113 条第(A)項である。これらの関連条項のコピーを**附属書 “B5”**として添付している。

商標法の最も関連性がある条項は第 34 条第(1)項第(a)号、第 (b)号および第(c)号、第 35 条である。

著作権法の最も関連性がある条項は第 23 条であり、これは第 2、6、7、8 および 9 条と併せて参照すべきものである。

c. 輸入規制における税関の役割は何か？

「関税および間接税に関する法」（模倣品取締法も参照）により、税関局は模倣の疑いがある物品を差し押さえ、当該商標または著作権の権利者による確認を経て、模倣品取締法に基づいて押収する権限を持つ。税関がかかる差押および押収を実行するのは、模倣品取締法第 15 条に従って当該商標または著作権が税関に登録されている場合のみである。税関への登録がなされていない場合、税関は、模倣品の疑いを根拠とした物品の差押または検証は行わない。

上記に加え、税関は市場の違法品の押収も行なう。かかる押収は通常、関税および間接税に関する法第 88 条第(1)項第(a)号に規定する税関の問い合わせに基づく物品の差押の後に実施される。このような物品は、たいていは模倣品であり、その場合には税関は当該物品を商標権利者に引き渡してそこで廃棄されることになる。

d. 模倣品市場に関係する規制当局は他に何かあるか?

南アフリカ警察庁（商業犯罪部）および貿易産業省が模倣品の差押および押収に関係する。従って、模倣品取締法に基づいて模倣品に対して措置を取る権限を有している機関は南アフリカ警察庁（SAPF）、貿易産業省（DTI）、南アフリカ国税庁(税関局) (SARS)のみである。

e. 模倣品に対する刑罰は何か?

模倣品取締法第 19 条が規定する初犯に対する最も重い刑罰は 1 品あたり 5,000 ランドまたは 3 年の禁固である。再犯以降についての最も重い刑罰は 1 品あたり 10,000 ランドまたは 5 年の禁固である。これらの刑罰は、当該商標または著作権の権利者が模倣業者に行なう民事上の損害賠償請求または合理的なロイヤルティ支払要求に加えて科されるものである。

f. 権利者は侵害をどのように裁判所に提訴し、どのように手続きが行われるか?

模倣品取締法が定める手続では、模倣品の取引は犯罪行為に該当し、刑事および/または民事手続の対象になる。実務上、模倣品は商標または著作権の権利者からの申立により SAPF、DTI または SARS (税関) が差し押さえ、それから模倣品取締法により当該物品を押収する。模倣品取締法により物品が押収された後、権利者は模倣業者に対する刑事手続を開始することができる。または、模倣業者に対する民事手続を取ることもできる。さらにまた、模倣業者に刑事および民事の手続を取ることもできる。

模倣品取締法は民事および刑事の手続開始期限を定めており、この期限を過ぎると押収品を返却しなければならない。民事でも刑事でも押収通知 (模倣品取締法第 7 条第(1)項第(d)号) の発行から 10 日以内に民事あるいは刑事の手続を開始する意図を通知しなければならず、かかる通知から 10 日以内に当該召喚状が発行される必要がある。

模倣業者に民事手続が開始される場合、通常は模倣品取締法を根拠とするかあるいは商標法または著作権法が定める商標または著作権の侵害を根拠とする。これらの場合、通常は高等裁判所に訴訟が提起され（請求に基づく召喚状が発行される）、最終的には事実審が開かれる。ほとんどの場合、模倣業者は防御を行わず、従って不出頭による判決が下される。

上記民事訴訟では、原告は損害賠償の支払または損害賠償に代えてのロイヤルティの支払の命令を求めるのが通常である。

6. 模倣に対する救済手段および措置

a. 外国の権利者はどのようにすれば模倣から自己の製品を保護できるか

i) - 刑事上の救済手段に基づく押収

- まず、模倣品の押収が可能となるためには、権利者が商標を登録しているか、著名商標であるか、または著作権法による保護の対象となる著作物の権利者でなければならないことが重要である。従って、常に、商標の登録は模倣品取締法による有効な取締のための第一歩である。
- 刑事上の救済手段については、原告は南アフリカ警察庁の商業犯罪部 (CCU) に告訴しなければならない。南アフリカ警察庁は南ア

フリカの主要地域のほとんどの CCU を設置しており、CCU が不在の小都市は町の場合には、近隣の CCU に捜査および押収への立ち会いを申し立てるか、あるいは地元警察に申し立てる。ただし、実際には、模倣品の取り扱いの訓練を受けているのは CCU のみであるため、申立は CCU に行なうことが望ましい。

- また、CCU は特別商業犯罪裁判所と連携または提携しているのが通常であることも重要である。特別商業犯罪裁判所は、模倣を含め、商業犯罪に関する経験を有する検察官と判事で構成されている。CCU に告訴して特別商業犯罪裁判所が取り扱った事件の勝訴率は原告が南アフリカ警察庁の他の組織に告訴した場合よりかなり高い。

- SAPF が 2012 年 2 月を末とする 1 年間に実施した押収の詳細を示す統計は上記パラグラフ 4b に示した通りである。警察による捜査および押収はほとんどが成功しており、最低でも、当該模倣品の押収、撤去および廃棄に至っている。かかる捜査により有罪判決に至る場合はこれより少ない。権利者と模倣業者の間で民事和解が成立すること、検事または捜査員の誤り、さらには原告が裏付および証拠を提出しないことにより刑事手続が進まないことも多い。また、レイプ、殺人、暴行など、もっとも重大事件と考えられる事件に検察官が忙殺され、模倣品事件が後回しにされることもよくある。

- 模倣品取締法は、模倣品の取り扱いに関して、刑事上の救済手段を設けている。模倣品には、商標または著作権を侵害する物品、および正規品と混同させる程度の類似性を有する物品がある。従って、当該物品が真正品またはいわゆる「保護対象品」と同一あるいは類似している場合については、模倣品取締法は刑事上の救済手段を定めている。しかし模倣品取締法は特許権または登録意匠（意匠特許）の侵害については救済手段を定めていないのである。

- 捜査および押収を求めて SAPF に告訴する場合、宣誓して（宣誓供述書の形式で）詳細な申立手続を行なう必要がある。これには通常、容疑者からの試験購入、試験購入品が模倣品であることの専門家による確認、試験購入を行った捜査員の宣誓供述書提出、製品を検証した専門家の宣誓供述書提出、模倣業者に対する刑事告訴を希望する原告の宣誓供述書提出が含まれる。宣誓供述書には購入したサンプルに関連する一連の証拠を明示しなければならないほか、当該サンプルが当該容疑者から購入したものであることの十分な証拠も必要である。さらに宣誓供述書には、当該試験購入品が商標あるいは著作権の権利者の許可を得て製造したものではなく、不正品であることの十分な証拠も提示しなければならない。最後に、宣誓供述書には当該侵害品が真正品または保護対象品と同一あるいは混同させる程度に類似しており、すなわち模倣品であることを判事が確認できるように、十分な真正品見本を含めなければならない。また、宣誓供述書には、捜査および押

収を実施する施設を判事が特定できるように、容疑者の施設に関する十分な情報を記載しなければならない。

- かかる捜査および押収の後、権利者は、捜査押収が行われた物品が模倣品であることを確認する証拠を提出しなければならない。さらに、当該品が模倣品であることを模倣容疑者が知っていたかあるいは模倣品の製造、販売、輸入、取引を行わないためのすべての合理的な措置を取っていなかったと確信した根拠を示さなければならない。

- 判事の令状なしに押収した物品は模倣品取締法第 5 条第(4)項が規定する判事部 (Magistrate) への申請を行い、警察が行った行為の確認を受ける必要がある。かかる申請では、当該物品の押収の前に警察が令状を申請しなかった理由を説明しなければならない。当該物品を押収する前に警察は令状を申請できたと判事が判断したときには、判事は第 5 条第(4)項が定める命令を発行しない。その場合、当該物品は直ちに返却される。従って、例外的な場合を除き、警察は捜査および押収に先立って令状を取得することが重要である。

- 押収手続および押収後の手続の流れを**附属書 “C”**のフローチャートに示した。

- 警察による捜査および押収の通常のコ費用は US \$3000 ~ \$5000 程度である。これには、試験購入費用、必要な宣誓供述書の作成料、警察への宣誓供述書の提出費用、令状取得に関する警察への支援費用、捜査および押収時の令状実行費用、模造品を模造品保管所に撤去する費用、警察による適切な押収関連文書の発行の費用が含まれる。発見された物品の数量により、上記の予想額には容疑者の施設から正式に指定された模倣品保管所への輸送費用および人件費が含まれる場合と含まれない場合がある。もちろん、発見された物品が大量であれば、作業および輸送にかかわる費用は増加する。

- 当局、特に警察の商業犯罪局部担当者との緊密な関係を構築しておくことが極めて重要である。このような関係の構築および育成は、模倣品取締法および製品識別に関する継続的な訓練を警察に提供することにより行われる。また、このような関係は発見された量が少量であっても警察を支援することでも育成される。例えば、刑事事件であれば、原告が有罪判決を得ようとすれば、押収品が少量であっても、警察に必要な支援（専門家による証拠その他の支援）を提供する必要があることが少なくない。このような「少量」でも警察を支援することで、権利者が権利実施に真剣であることを警察に示し、類似の侵害について注意するよう警察官に促すことになる。

- 南アフリカで刑事上の救済手段を求めるときに留意すべき重要事項は、模倣品取扱容疑に対する最も一般的な防御として、自分を取り扱っている品が模造品とは知らなかったという抗弁がなされるということである。従って、相手方が取り扱っているのは模倣品であることを訴訟提起前に通告しておくか、あるいは、民事手続によって模倣品を取り扱ったことを確定しておくことが必要となる場合が多い。このような民事的解決では、模倣業者は通常、権利者宛の文書に署名して、特定の商標または著作物を二度と取り扱わないと確約する。この模倣業者が次に模倣品を取り扱ったときには、当該品が模倣品であることを知らなかったと主張することができない。模倣業者が、自己が扱っている物品が模倣品でないことを確認するための合理的措置を取らなかった場合には、確約あるいは事前通知がなくても、模倣業者が有罪とされる可能性があるということは知っておくべきである。

- また、裁判手続では、物品が真正品かどうかについて専門家の鑑定が必要となる場合もあることも重要である。従って、現地の代理店、ライセンサー、または完全子会社が原告に代わって宣誓供述書を提出しあるいは証言することは非常に役立つ。商標権利者が、自己の商標または著作権対象物を使用した模倣品の識別について自己の弁理士を訓練し、かかる弁理士が手続で専門家として行為できるようにしている例もある。ただし、かかる訓練は継続的かつ詳細でなければならず、当該物品について弁理士が十分な知識を有していないとして専門家と

して認められないリスクは常に存在する。さらに、南アフリカの法律は、トレード・ドレスを「侵害」した製品の押収を認めておらず、このことが市場の不公正競争の原因になっている。かかる「侵害」は南アフリカのコモン・ローではパッシングオフと呼ばれており、民事訴訟のみが認められる。パッシングオフを根拠とする訴訟では違反品の即時押収あるいは撤去を行なうことができず、このような事件の原告はまず民事事件として、当該物品の保全または廃棄のための預託命令を裁判所から発行してもらう必要がある。

ii) 具体的事件例

▶ 税関での代表的な通関保留および押収事件

2012年6月5日、著名ブランドのベビー用おむつ9万個がダーバン港経由で輸入されるとの通知が当事務所にあった。この商標は税関に登録され記録されていたため、税関は、当該品が模倣品であるとの疑いにより、関税および間接税に関する法第113条第(A)項を根拠として差し押さえた。サンプル品が採取され、2012年6月7日に、当事務所に差押通告書とともに送付されてきた。当事務所は顧客にこの件を報告し、顧客は当該品が正規品ではなく模倣品であることを確認した。顧客の署名用の宣誓供述書を作成し、2012年6月8日に顧客に送付した。

2012年6月11日、顧客から当該品が模倣品である理由を記述し署名した宣誓供述書を受け取り、税関に提出した。

2012年6月28日、税関は模倣品取締法に基づき、9万個のおむつを押収する令状を申請した。同日、押収通知書が発行された。輸入業者の詳細が記載されたそのコピーが当事務所に提出された。

その後の20営業日の期間内に、当事務所は輸入業者に要求書を送付した。輸入業者は、当該品にブランド表示があるため模倣品にあたることを知らなかったと主張した。輸入業者は、当事務所の顧客に2万5000ランドを支払うことおよび当該品は当事務所に自主的に提出して廃棄処分とすることに同意した。輸入業者はまた、当事務所の顧客の著名な商標を表示した物品を二度と輸入しないことの念書にも署名した。

その後、当該品は廃棄処分とされた。

▶ 警察による市場からの押収の典型例

5月1日、民間調査機関による調査に従い、当事務所は南アフリカ警察庁商業犯罪部に対し、当事務所の顧客の著名商標を表示したプラスチック製家庭用品の販売に関する告発を行った。調査員は試験購入を実施し、調査の過程で当該品が保管されている倉庫の詳細を把握した。

警察は、かかる者に対する告訴に基づき、調査員が明らかにした倉庫施設に対する捜査令状の発行を判事部に申請した。同日に令状が発行され、当事務所は警察とともに同施設を訪問した。

施設で警察は身元を明かし、捜査令状を施設の占有者に手渡して施設の捜査を開始した。この施設では当事務所顧客の著名商標を使用したプラスチック製家庭用品 32 000 個が発見された。これらを模倣品保管所に運搬し、警察が押収通知書を発行した。

再三にわたる要求にもかかわらず、倉庫所有者は本件の民事での解決を拒否した。そのため、南アフリカ高等裁判所から、民事事件として倉庫所有者（被告）に対して召喚状が発行された。被告は民事訴訟の防御を行わず、裁判不出頭により、物品の廃棄を認めるとともに被告が将来かかる物品を取り扱うことを禁止し原告に訴訟費用を支払うことが命じられた。

刑事事件については、倉庫所有者が無罪答弁を行ったため公判は 2012 年 11 月に延期されている。

➤ 税関による差押の典型例 (関税法違反)

2012年7月17日、南アフリカ国税庁はプレトリアのマラバスタッド所在のアジアン・バザールと呼ばれる非正規市場の税関調査を実施した。調査の目的は関税法違反の摘発にあった。

調査時に、各種の著名商標、特に衣類の商標を使用した数百の物品が発見され、商店主が当該物品の輸入税および VAT 税の納付証明書を提示できなかったことその他の関税関連の違反を根拠に、税関はこれらを差し押さえた。

当該物品は国の倉庫に輸送され 60 日間保管された。その間、物品所有者は関税法に従ったことの証拠文書を提示しなかった。その結果、当該物品の所有権は国に移転したことが宣告され、ブランド権利者と南アフリカ国税庁との合意により、当該品はブランド権利者に提出され、廃棄処分されることになった。これについてはブランド権利者が税関に当該品が模倣品であることの証拠を提出することが条件とされていたが、この条件は満たされた。

当事務所の経験では、このような取引で関税法を遵守していることの証拠を提示できるのは 1%未満である。

- 警察による市場での令状なしの押収

2012年2月20日、南アフリカ警察庁の警察犬部が、ダーバンのビクトリア・エンバンクメントの敷地に立入って薬物および麻薬の捜査を行った。敷地への立ち入り時に、警察は、工場の中に、著名商標を表示し、著名商標のステッカーを貼付し、ブランド所有者によるオリジナル包装を模倣した包装に入れられた携帯電話用電池を発見した。警察がこの施設に立ち入ったのは午後16時30分であり、被疑侵害品の押収について判事部に捜査令状を請求しあるいはその手続をすることができなかった。

警察は、この件をブランド権利者の専門家と協議した後、模倣品取締法に基づき、当該の2400個の携帯電話用電池を押収した。

当事務所は、ブランド所有者の指示に基づき、模倣品取締法第5条第(4)項に基づく申請書を作成した（当該警察官による署名用の宣誓供述書を含む）。押収通知（模倣品取締法第7条第(1)項第(d)号に規定）が発行されてから裁判所開廷日10日以内に、判事部に申請書を提出した。これらの書類の中で、当事務所は、警察が押収に先立って令状を取得できなかった理由を説明し、警察の措置を容認するよう求めた。裁判所は警察の措置を容認し、適切な命令が発行された。

その後の刑事手続において、著名商標を携帯電話電池に使用していたことも判明した施設所有者は模倣品製造で有罪となり、R30 000 ラン

ドの罰金が科されたほか、100 000 ランドの罰金と 3 年間の執行猶予
または 12 ヶ月の懲役が科されることとなった。

- b. 模倣品が南アフリカ市場に流入することを防止するため、権利者は南アフリカ税関にどのような事前登録を行えばよいか?

南アフリカ国税庁関税局は「関税および間接税に関する法」第 113 条第(A)項に基づき、検査目的で模倣品を差し押さえることができる。同法および南アフリカ国税庁の実務運用により、物品を 5 日間差し押さえて権利者が当該品が模倣品でないか確認することができる。申請があればさらに 5 日間延長される。

かかる差押は、模倣品取締法第 15 条に従い、権利者がその商標または著作権を南アフリカ国税庁に事前登録しておく必要があることが重要である。

第 15 条による登録では、申請書の作成および SARS への提出は比較的単純であるが、申請者は申請者の弁理士に対する委任状を SARS に提出しなければならないほか、SARS に対して無制限の補償をおこなわなければならない。附属書“D1”と“D2”に白紙委任状と補償念書を添付している。第 15 条による登録の有効期間は 2 年であり、上記に加えて、下記の裏付文書を提出しなければならない。

- (1) 当該商標の登録証明書のコピー

- (2) 著作権または著名商標を根拠とする場合は、当該の著名商標または著作権の占有権を裏付ける宣誓供述書
- (3) 真正品が差し押さえられることを防止するため真正品輸入業者リスト
- (4) 申請者が法的措置を取る場合の物品の最低数量
- (5) かかる押収に関して、申請者が当該物品の保護価格を SARS に提示する旨の念書

終わりに

この調査から明らかに分かるように、南アフリカには実効性のある模倣禁止戦略が存在する。しかし残念ながら、措置を取るかどうかは主として権利者に委ねられており、輸送料、保管料、廃棄料を含め、費用の大半を権利者が負担しなければならない。このことと、模倣品に対する国内需要および豊富な供給量がいまあって、南アフリカ市場には大量の模倣品が出回っている。

ADAMS & ADAMS

S.P. YEATES

パートナー

2012年10月31日

プレトリア

COUNTERFEIT GOODS ACT 37 OF 1997

[ASSENTED TO 19 SEPTEMBER 1997]

[DATE OF COMMENCEMENT: 1 JANUARY 1998]

(English text signed by the President)

as amended by

Counterfeit Goods Amendment Act 25 of 2001

Regulations under this Act

ACT

To introduce measures aimed against the trade in counterfeit goods so as to further protect owners of trade marks, copyright and certain marks under the Merchandise Marks Act, 1941, against the unlawful application, to goods, of the subject matter of their respective intellectual property rights and against the release of goods of that nature (called 'counterfeit goods') into the channels of commerce; for that purpose-

to prohibit certain acts in relation to counterfeit goods as well as the possession of counterfeit goods in certain circumstances;

to create offences in that regard and prescribe penalties in relation thereto;

to confer, in certain circumstances, upon inspectors and certain members of the South African Police Service the power, upon having obtained a warrant, or upon being otherwise authorised by or in terms of this Act, to enter premises and there to search for, and, if found, to seize and remove, counterfeit goods or suspected counterfeit goods for detention pending the finalisation of civil or criminal proceedings to be instituted or any other disposal thereof authorised by or in terms of the Act;

to provide that the Commissioner for Customs and Excise and his or her staff, upon having granted an application to that end by the owner of an intellectual property right, will have the power to seize and detain counterfeit goods or suspected counterfeit goods imported into or entering the Republic during a particular period and calculated to infringe that intellectual property right;

and to provide for incidental matters.

1 Definitions

(1) In this Act, unless inconsistent with the context-

'act of dealing in counterfeit goods' means any act or conduct referred to in section 2 (1);

'apply to', with reference to any goods, means use upon or in physical or other relation to any goods, and, unless clearly inappropriate, includes to embody or incorporate in any goods;

'complainant' means a person who, in terms of section 3 (1), is entitled to lay a complaint contemplated in that section and who has laid such a complaint;

'counterfeiting'-

- (a) means, without the authority of the owner of any intellectual property right subsisting in the Republic in respect of protected goods, the manufacturing, producing or making, whether in the Republic or elsewhere, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are substantially identical copies of the protected goods;
- (b) means, without the authority of the owner of any intellectual property right subsisting in the Republic in respect of protected goods, manufacturing, producing or making, or applying to goods, whether in the Republic or elsewhere, the subject matter of that intellectual property right, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his or her licence; or
- (c) where, by a notice under section 15 of the Merchandise Marks Act, 1941 (Act 17 of 1941), the use of a particular mark in relation to goods, except such use by a person specified in the notice, has been prohibited, means, without the authority of the specified person, making or applying that mark to goods, whether in the Republic or elsewhere.

However, the relevant act of counterfeiting must also have infringed the intellectual property right in question;

'counterfeit goods' means goods that are the result of counterfeiting, and includes any means used for purposes of counterfeiting;

'counterfeit goods depot' means a place designated under section 23 to be a counterfeit goods depot, and includes any place deemed by section 7 (1) (c) to be a counterfeit goods depot;

'document' includes a tape recording, a photograph and any electronic or magnetic or other medium on, in, or by means or by way of which, images, sound, data or information may be stored, and 'documentary' will be construed accordingly;

'exporter' includes any person who, at the relevant time-

- (a) is the owner or is in control or possession of any goods exported or to be exported from the Republic;
- (b) carries the risk for any goods so exported or to be so exported;
- (c) represents that or acts as if he or she is the exporter or owner of any goods so exported or to be so exported;
- (d) actually takes or attempts to take any goods from the Republic;
- (e) has a beneficial interest, in any manner or of any nature whatsoever, in any goods so exported or to be so exported;
- (f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e) of this definition,

and, in relation to imported goods destined for exportation from the Republic, includes the manufacturer, producer, maker, supplier or shipper of those goods or any person inside or outside the Republic representing or acting on behalf of such a

manufacturer, producer, maker, supplier or shipper. **'Export'** and **'exportation'** will be construed in accordance with the preceding provisions of this definition;

'importer' includes any person who, at the relevant time-

- (a) is the owner or is in control or possession of any goods imported or to be imported into the Republic;
- (b) carries the risk for any goods so imported or to be so imported;
- (c) represents that or acts as if he or she is the importer or owner of any goods so imported or to be so imported;
- (d) actually brings or attempts to bring any goods into the Republic;
- (e) has a beneficial interest, in any manner or of any nature whatsoever, in any goods so imported or to be so imported;
- (f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e) of this definition,

and **'import'** and **'importation'** will be construed accordingly;

'inspector' means any person who under or by virtue of section 22 has been appointed as or designated to be an inspector for the purposes of this Act, as well as-

- (a) any police official as defined in section 1 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977), holding the rank of sergeant or a higher rank;
- (b) the Commissioner for Customs and Excise and any official contemplated in section 15 (9), in performing their functions in the circumstances contemplated in section 15 (4);

'intellectual property right'-

- (a) means the rights in respect of a trade mark conferred by the Trade Marks Act, 1993 (Act 194 of 1993), and includes rights in respect of a trade mark contemplated in section 35 of that Act;

[Para. (a) substituted by s. 1 of Act 25 of 2001.]

- (b) means the copyright in any work in terms of the Copyright Act, 1978 (Act 98 of 1978);
- (c) in the case where, by a notice issued under section 15 of the Merchandise Marks Act 1941, the use of a particular mark in relation to goods, except such use by a person specified in the notice, has been prohibited, means the concomitant exclusive right of that specified person so to use that mark;

'Minister' means the Minister of Trade and Industry;

'owner', in relation to an intellectual property right, includes a person who has the capacity in law to enforce the intellectual property right in his or her own name;

'package' or 'packaging' means any container, wrapping or outer cover and the contents thereof, or any bundle or single piece in the case of unpacked goods, and, when used as a verb, has a corresponding meaning;

'prescribed' means prescribed by regulation under this Act;

'protected goods' means-

- (a) goods featuring, bearing, embodying or incorporating the subject matter of an intellectual property right with the authority of the owner of that

intellectual property right, or goods to which that subject matter has been applied by that owner or with his or her authority;

- (b) any particular class or kind of goods which, in law, may feature, bear, embody or incorporate the subject matter of an intellectual property right only with the authority of the owner of that intellectual property right, or to which that subject matter may in law be applied, only by that owner or with his or her authority, but which has not yet been manufactured, produced or made, or to which that subject matter has not yet been applied, with the authority of or by that owner (whichever is applicable);

'this Act' includes any regulation made under this Act;

'tools' includes machinery;

'vehicle' includes any motor car, van, truck, trailer, caravan, cart, barrow, train, aircraft, ship, boat or other vessel, and any other vehicle, craft or means of conveyance of any kind whatsoever, whether self-propelled or not, as well as any pack animal.

(2) Without derogating from the meanings of the words 'place', 'premises' and 'vehicle', and unless clearly inappropriate, any reference in this Act-

- (a) to any place or premises, must be construed as a reference also to any freight container, irrespective of its size, at, on or in the place or premises;
- (b) to any vehicle, must be construed as a reference also to such a freight container on or in the vehicle.

2 Dealing in counterfeit goods prohibited and an offence

(1) Goods that are counterfeit goods, may not-

- (a) be in the possession or under the control of any person in the course of business for the purpose of dealing in those goods;
- (b) be manufactured, produced or made except for the private and domestic use of the person by whom the goods were manufactured, produced or made;
- (c) be sold, hired out, bartered or exchanged, or be offered or exposed for sale hiring out, barter or exchange;
- (d) be exhibited in public for purposes of trade;
- (e) be distributed-
 - (i) for purposes of trade; or
 - (ii) for any other purpose to such an extent that the owner of an intellectual property right in respect of any particular protected goods suffers prejudice;
- (f) be imported into or through or exported from or through the Republic except if so imported or exported for the private and domestic use of the importer or exporter, respectively;
- (g) in any other manner be disposed of in the course of trade.

(2) A person who performs or engages in any act or conduct prohibited by subsection (1), will be guilty of an offence if-

- (a) at the time of the act or conduct, the person knew or had reason to suspect that the goods to which the act or conduct relates, were counterfeit goods; or
- (b) the person failed to take all reasonable steps in order to avoid any act or conduct of the nature contemplated in subsection (1) from being performed or engaged in with reference to the counterfeit goods.

3 Laying a complaint

(1) Any person who has an interest in protected goods, whether as the owner or licensee of an intellectual property right in respect of the protected goods or as an importer, exporter or distributor thereof (including the duly authorised agent or representative or the attorney of any such person), who reasonably suspects that an offence referred to in section 2 (2) has been or is being committed or is likely to be committed by any person, may lay a complaint to that effect with any inspector.

(2) (a) The complainant must furnish information and particulars, to the satisfaction of the inspector, to the effect that the goods with reference to which that offence allegedly has been or is being or is likely to be committed, *prima facie* are counterfeit goods.

(b) For the purposes of paragraph (a), the complainant may furnish to the inspector a specimen of the alleged counterfeit goods, or, if not reasonably possible, sufficient information and particulars from which the essential physical and any other distinctive features, elements and characteristics of the alleged counterfeit goods may be ascertained, and sufficient information and particulars as to the subsistence and extent of the intellectual property right, the subject matter of which allegedly has been applied to the goods alleged to be counterfeit goods, and as to the complainant's title to or interest in that right, and, where the alleged counterfeit goods are calculated to infringe an intellectual property right that subsists in respect of or has been applied to protected goods contemplated in paragraph (a) of the definition of 'protected goods' in section 1 (1), also a specimen of the relevant protected goods.

(3) In relation to a complaint that has been laid, an inspector must take appropriate steps in terms of and subject to section 4 (1), if reasonably satisfied-

- (a) that the person having laid the complaint, *prima facie* is a person who, in terms of subsection (1), is entitled to do so; and
- (b) that-
 - (i) the goods claimed to be protected goods, *prima facie* are protected goods; and
 - (ii) the intellectual property right, the subject matter of which is alleged to have been applied to the offending goods, *prima facie* subsists; and
- (c) that the suspicion on which the complaint is based, appears to be reasonable in the circumstances.

(4) The preceding provisions of this section do not preclude an inspector from taking any appropriate steps in terms of section 4 (1) on his or her own initiative in relation to any act or conduct believed or suspected to be an act of dealing in counterfeit goods, provided the requirements of that section are met.

4 Inspector's powers in relation to counterfeit goods

(1) If, pursuant to any complaint laid with an inspector or on the strength of any other information at his or her disposal, the inspector has reasonable grounds to suspect that an offence contemplated in section 2 (2) has been or is being committed or is likely to be committed, or to believe that an act of dealing in counterfeit goods has taken or is taking place or is likely to take place, he or she has the power, in accordance with paragraphs **(a)** to **(f)** of section 5 (1)-

- (a)** to enter upon or enter any place, premises or vehicle in order to inspect any relevant goods and seize any suspected counterfeit goods, and may seize any suspected counterfeit goods found and cause them to be detained in accordance with this Act, and, where applicable, remove the suspected counterfeit goods for the purposes of detention;
- (b)** to collect or obtain evidence relating to the suspected counterfeit goods or the relevant act of dealing in counterfeit goods;
- (c)** to conduct at, on or in such place, premises or vehicle whatever search may be reasonably necessary for the purposes of paragraph **(a)** or **(b)** (including the search of a person); and
- (d)** to take whatever steps may be reasonably necessary in order to terminate the relevant act of dealing in counterfeit goods.

(2) Subject to section 5 (2), the powers conferred on an inspector by subsection (1) may be exercised only on the authority of a warrant issued under section 6, and may be exercised wherever the suspected act of dealing in counterfeit goods has taken or is taking place or is likely to take place or is suspected on reasonable grounds to have taken place or to be taking place.

5 Extent of Inspector's powers in relation to counterfeit goods

(1) An inspector acting on the authority of and in accordance with a warrant issued under section 6, may at any reasonable time-

- (a)** enter upon or enter, and inspect, any place, premises or vehicle at, on or in which goods that are reasonably suspected of being counterfeit goods, are to be found or on reasonable grounds are suspected to be or to be manufactured, produced or made, and search such place, premises or vehicle and any person thereat, thereon or therein, for such goods and for any other evidence of the alleged or suspected act of dealing in counterfeit goods. For the purposes of entering, inspecting and searching such a vehicle, an inspector who is a police official or who is assisted by a police official may stop the vehicle, if necessary by force, wherever found, including on any public road or at any other public place;
- (b)** take the steps that may be reasonably necessary to terminate the manufacturing, production or making of counterfeit goods, or any other act of dealing in counterfeit goods being performed, at, on or in such place, premises or vehicle, and to prevent the recurrence of any such act in future. Those steps may include any of the steps contemplated in paragraphs **(c)**, **(d)** and **(e)** but do not include the destruction or alienation of the relevant goods unless authorised by the court in terms of this Act;
- (c)** seize and detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle;
- (d)** seal or seal off any place, premises or vehicle at, on or in which-

- (i) the goods in question are found, or are manufactured, produced or made, either wholly or in part;
- (ii) any trade mark, or any exclusive mark contemplated in paragraph (c) of the definition of 'counterfeiting' in section 1 (1), or any work which is the subject matter of copyright, is applied to those goods;
- (iii) the packaging for those goods is prepared; or
- (iv) the packaging of those goods is undertaken;
- (e) seize and detain, and, where applicable, remove for detention, any tools which may be used in the manufacturing, production, making or packaging of those goods or applying a trade mark or that exclusive mark or such a work to them; and,
- (f) if he or she reasonably suspects that a person at, on or in such place, premises or vehicle may furnish any information with reference to any act of dealing in counterfeit goods-
 - (i) question that person and take down a statement from him or her;
 - (ii) demand and procure from that person any book, document, article, item or object which in any way may be relevant to the nature, quantity, location, source or destination of the goods in question, or the identity and address of anyone involved or ostensibly involved as a supplier, manufacturer, producer, maker, distributor, wholesaler, retailer, importer, exporter or forwarding agent of, or other dealer in, the goods in question.

(2) Subject to subsection (3), an inspector may, during the day, without a warrant enter upon or enter any place, premises or vehicle after having identified himself or herself, and, in accordance with paragraphs (a) to (f) of subsection (1), exercise the powers of seizure, removal, detention, collecting evidence and search contemplated in section 4 (1) (a), (b) and (c) (except the power to search any person), as well as the power to take the steps contemplated in section 4 (1) (d), if-

- (a) the person who is competent to consent to the entry and to such search, seizure, removal and detention, gives that consent; or
- (b) the inspector on reasonable ground believes that-
 - (i) the required warrant will be issued to him or her in terms of section 6 if he or she were to apply for the warrant; and
 - (ii) the delay that would ensue by first obtaining the warrant would defeat the object or purpose of the entry, search, seizure, removal, detention, collection of evidence and other steps.

(3) Subsection (2) (b) does not serve as authority for, and may not be applied for the purposes of, entering and searching any private dwelling, nor for conducting such seizure and removal, the collection of evidence and the taking of the said other steps therein.

(4) Notwithstanding the provisions of subsections (1) and (2)-

- (a) any acts performed by an inspector by virtue of subsection (2) must be confirmed by a magistrate or a judge of the High Court having jurisdiction in the area where the acts were performed, on the application of the

inspector brought within 10 court days of the day on which those acts were performed;

[Para. (a) substituted by s. 2 (a) of Act 25 of 2001.]

- (b) no answer given or statement made by any person to an inspector exercising his or her powers in terms of paragraph (f) (i) of subsection (1) or given or made to any inspector exercising like powers by virtue of subsection (2), will, if self-incriminating, be admissible as evidence against that person in criminal proceedings instituted in any court against him or her, except in criminal proceedings where that person is tried for an offence contemplated in section 18 (d) (ii), and then only to the extent that such answer or statement is relevant to prove the offence charged.

(4A) If the magistrate or judge contemplated in subsection (4) (a) does not confirm the acts performed by the inspector, the inspector must return any goods seized forthwith and make good any damage caused.

[Sub-s. (4A) inserted by s. 2 (b) of Act 25 of 2001.]

(5) The provisions of section 6 (4) regarding the manner in which a search must be conducted, and section 6 (5) (b), (6), (7), (8) and (9), will apply *mutatis mutandis* to an inspector acting by virtue of subsection (2) of this section.

6 Provisions relating to issue and execution of warrant

(1) The warrant contemplated in section 4 (2) read with section 5 (1) will be issued in chambers by any judge of the High Court or by a magistrate who has jurisdiction in the area where the relevant suspected act of dealing in counterfeit goods is alleged to have taken or to be taking place or is likely to take place, and will be issued only if it appears to the judge or magistrate from information on oath or affirmation that there are reasonable grounds for believing that an act of dealing in counterfeit goods has taken or is taking place or is likely to take place, and the inspector seeking the warrant may be asked to specify which of the powers contemplated in section 4 (1) is or are likely to be exercised.

(2) A warrant in terms of this section may be issued either with reference to only one separate suspected act of dealing in counterfeit goods or with reference to any number of such acts, whether any such act involves only one alleged offender or any number of alleged offenders, and irrespective of whether such offender or number of offenders is identified specifically by name or by reference to any particular place or circumstances, and any point in time.

(3) A warrant in terms of this section may be issued on any day and will be in force until-

- (a) it has been executed; or
- (b) it is cancelled by the judge or magistrate who issued it, or, if not available, by any other judge, or by any other magistrate with like authority (as the case may be); or
- (c) the expiry of three months from the day of its issue; or
- (d) the purpose for which the warrant was issued, no longer exists,

whichever may occur first.

(4) A warrant issued in terms of this section may be executed by day only, unless the person who has issued the warrant has authorised the execution thereof by night at times which must be reasonable, and the entry upon or into and search of any place, premises or vehicle specified in the warrant, and the search of any person thereat, thereon or therein, must be conducted with strict regard to decency and order, including-

- (a) a person's right to, respect for and protection of his or her dignity;
- (b) the right of a person to freedom and security of his or her person; and
- (c) the right of a person to his or her personal privacy.

(5) An inspector executing a warrant in terms of this section must immediately before commencing with the execution thereof-

- (a) identify himself or herself to the person in control of the place, premises or vehicle to be entered upon or entered, if that person is present, and hand to that person a copy of the warrant, or, if that person is not present, affix a copy of the warrant to a prominent spot at, on or to the place, premises or vehicle;
- (b) furnish that person at his or her request with particulars regarding the inspector's authority to execute such a warrant. For that purpose an inspector may be requested to produce the certificate issued in respect of him or her under section 22 (3).

(6) An inspector who on the authority of a warrant issued in terms of subsection (1) may enter upon or enter, and search, any place, premises or vehicle and search any person thereat, thereon or therein, may use such force as may be reasonably necessary to overcome any resistance to the entry and search.

(7) An inspector may enter upon or enter, and search, any place, premises or vehicle, and may search any person thereat, thereon or therein, only if he or she audibly has first demanded access thereto and has notified the purpose of the entry, unless the inspector on reasonable grounds is of the opinion that any goods, document, article or item may be destroyed or be lost if access is first demanded and that purpose notified.

(8) If, during the execution of a warrant in terms of this section, a person claims that any goods, document, article or item found at, on or in the place, premises or vehicle in question contains privileged information and refuses the inspection or removal thereof, the inspector executing the warrant, if of the opinion that the goods, document, article or item may be relevant to and necessary for the investigation of any complaint or any alleged or suspected act of dealing in counterfeit goods, must request the registrar of the High Court having jurisdiction, or that registrar's deputy, to seize and remove such goods, document, article or item for safe custody until the court has made a ruling on the question whether or not the information in question is privileged.

(9) In undertaking any search for and inspection and seizure of suspected counterfeit goods an inspector may be assisted by the complainant (if any) or any other knowledgeable person in identifying goods as suspected counterfeit goods.

7 Duties of inspector following seizure of goods

(1) An inspector who, in exercising his or her powers in terms of section 4 (1), has seized any suspected counterfeit goods, must-

- (a) forthwith seal, clearly identify and categorise these goods and prepare, in quadruplicate, an inventory of them and cause the person from whom those goods were seized to check the inventory for correctness, and, if correct, cause that person to make a certificate to that effect under his or her signature on each original of that inventory. If the seized goods are removed in terms of paragraph (c), the inspector must endorse that fact under his or her signature on every original of that inventory, in which case that inventory will also serve as a receipt;
- (b) furnish one of the originals of the inventory to the person from whom the goods were seized and another to the complainant (if any) within 72 hours after the seizure;
- (c) as soon as possible remove the goods, if transportable, to a counterfeit goods depot for safe storage, or, if not capable of being removed or transported, declare the goods to have been seized, and seal off or seal and lock up those goods or place them under guard at the place where they were found, and thereupon that place will be deemed to be a counterfeit goods depot; and
- (d) by written notice inform the following persons of the action taken by the inspector in terms of section 4 (1) and of the address of the counterfeit goods depot where the seized goods are kept:
 - (i) The person from whom those goods were seized; and
 - (ii) also-
 - (aa) the complainant, where the inspector exercised his or her powers in terms of section 4 (1) pursuant to a complaint laid in terms of section 3 (1); or
 - (bb) any person who, in relation to those goods, qualifies in terms of section 3 (1) to be a complainant, but who had not yet so laid a complaint at the time when the inspector exercised those powers on his or her own initiative as contemplated in section 3 (4).

(2) In any notice in terms of subsection (1) (d) that is issued-

- (a) to the complainant, the complainant must be notified of his or her right by virtue of section 9 (1) (a) to lay a criminal charge, not later than three days after the date of the notice, against the person from whom those goods were seized (hereafter called the suspect);
- (b) to a person qualifying to be a complainant, as contemplated in paragraph (d) (ii) (bb) of subsection (1), the inspector must invite that person (hereafter called the prospective complainant) to lay a complaint with him or her, and lay with the South African Police Service a criminal charge, not later than three days after the date of the notice, against the suspect for having performed an act of dealing in counterfeit goods that is an offence in terms of section 2 (2).

(3) An inspector may demand from a complainant to disclose any information which may be relevant to the action that has been taken.

(4) **(a)** Any person prejudiced by a seizure of goods in terms of section 4 (1), may at any time apply to the court on notice of motion for a determination that the seized goods are not counterfeit goods and for an order that they be returned to him or her.

(b) The court may grant or refuse the relief applied for and make such order as it deems just and appropriate in the circumstances, including an order as to the payment of damages and costs, if applicable.

(c) If deemed just and appropriate in the circumstances by a court that has refused the order sought, it may order, where those goods have been seized pursuant to a complaint laid in terms of section 3 (1), that the complainant furnishes security to the applicant in respect of those goods in an amount and manner determined by the court.

8 Storage of seized goods, and access thereto

(1) Goods that have been seized in terms of section 4 (1) must be stored and kept in safe custody at a counterfeit goods depot until the person in charge of the depot-

- (a)** is ordered by a competent court in terms of this Act to return, release, destroy or otherwise dispose of those goods as specified in the order; or
- (b)** is directed by the inspector concerned, in the circumstances provided for in subsection (1) **(b)** or (2) **(a)**, **(b)** or **(c)** of section 9, to release those goods to the suspect.

(2) Goods seized in terms of section 4 (1) will be available for inspection by the complainant, or, as the case may be, prospective complainant (if any), the suspect and any other interested person at the counterfeit goods depot on any working day during normal office hours.

(3) The person in charge of the counterfeit goods depot, on the request of the complainant or prospective complainant (as the case may be) or the suspect, must make the relevant seized goods available for testing or analysis by or on behalf of any such complainant or the suspect if the person so in charge, having taken into account the nature of such seized goods, the nature of the tests or analyses to be conducted, and the competence and suitability of the person by whom the tests or analyses are to be conducted, is satisfied that a request in that regard is reasonable.

(4) The person in charge of a counterfeit goods depot who is not willing to allow seized goods under his or her custody to be made available to the suspect for testing or analysis by any person or by a particular person, must forthwith refer the matter to the complainant or prospective complainant (as the case may be) who must either confirm or reverse that decision within 48 hours.

(5) **(a)** Where any such complainant has confirmed the decision not to allow the seized goods to be made available to the suspect for testing or analysis, that decision must be conveyed in writing to the suspect who may apply to the court for an order rescinding the decision and allowing those goods to be made so available.

(b) The court will grant the application if it finds the decision to be unreasonable in the circumstances.

9 Seized goods to be released if criminal investigation or criminal or civil proceedings not contemplated against suspect

(1) **(a)** Where suspected counterfeit goods have been seized by an inspector in terms of section 4 (1), the complainant or prospective complainant (as the case may be), if he or she wishes to lay a criminal charge against the suspect with the South African Police Service for having committed an offence referred to in section 2 (2) and request that a criminal investigation into the matter be undertaken, must do so not later than three days after the date of the notice referred to in section 7 (2).

(b) If, upon the expiry of that three day period, a criminal charge has not so been laid, the relevant seized goods must be released to the suspect, subject to subsection (2).

(2) Subject to subsection (3), goods seized in terms of section 4 (1), must be released to the suspect also-

- (a)** (i) if the State fails within 10 working days after the date of the notice given to the suspect in terms of paragraph **(d)** (i) of section 7 (1) to inform the suspect, by further written notice, of its intention to institute a criminal prosecution against him or her for having committed an offence referred to in section 2 (2); and
- (ii) if any person to whom notice has been given in terms of paragraph **(d)** (ii) of section 7 (1) fails within 10 working days after the date of that notice to inform the suspect, by further written notice, of the person's intention to institute against the suspect civil proceedings founded on an act of dealing in counterfeit goods on the part of the suspect; or
- (b)** in any case where the State or that person has so given further notice, if that criminal prosecution or those civil proceedings (as the case may be) is or are not instituted within 10 court days after the date of the relevant further notice; or
- (c)** if the complainant in writing has instructed the inspector to release those goods to the suspect. However, such an instruction may not be given and the relevant seized goods may not be so released at any time after a criminal prosecution involving those goods has been instituted against the suspect; or
- (d)** upon the order of a competent court.

(3) **(a)** For the purpose of effecting the release of goods in terms of subsection (1) **(b)** or (2) **(a)**, **(b)** or **(c)**, the inspector who had seized those goods in terms of section 4 (1) must issue a notice to the person in charge of the counterfeit goods depot where those goods are detained, directing that the relevant goods, as specified in the copy of the inventory attached to that notice, be released to the person specified therein, and at the same time cause a copy of that notice to be served on the suspect and on the complainant.

(b) The person in control of a counterfeit goods depot to whom a notice has been issued in accordance with the provisions of paragraph **(a)**, must release the relevant goods in accordance with that notice, on the fourth day after the date of that notice, unless a competent court has ordered otherwise.

10 Other orders that may be issued by court

(1) Without derogating from the powers of a court in any civil or criminal proceedings relating to counterfeit goods, such a court may order-

- (a) that the goods in question, where they have been found to be counterfeit goods, be delivered up to the owner of the intellectual property right the subject matter of which has been unlawfully applied to those goods, or up to any complainant deriving his or her title from that owner, irrespective of the outcome of the proceedings;
- (b) that those goods be released to any person specified in the order;
- (c) that the complainant pays damages, in an amount determined by the court, to the person from whom those goods were seized and pays that person's costs;
- (d) that the accused or the defendant or respondent (as the case may be) discloses the source from which those goods, if found to be counterfeit goods, have been obtained, as well as the identity of the persons involved or ostensibly involved in the importation, exportation, manufacture, production or making, and the distribution, of the counterfeit goods and in the channels of distribution of those goods.

(2) If a court in any civil or criminal proceedings has ordered the delivery up to any person of goods found to be counterfeit goods derived from any process of counterfeiting contemplated in paragraph (b) or (c) of the definition of 'counterfeiting' in section 1 (1), then, notwithstanding the provisions of any law, those goods-

- (a) may not be released into the channels of commerce upon the mere removal of the subject matter of the intellectual property right that was unlawfully applied to those goods;
- (b) if imported, may not be exported in an unaltered state,

unless the court, on good cause shown, has ordered otherwise.

11 Court may authorise search and attachment, pending institution of civil proceedings, to preserve evidence relevant to infringement of intellectual property right, etc

(1) The owner of an intellectual property right who is aware or has reasonable grounds to believe that an act of dealing in counterfeit goods has taken or is taking place or is likely to take place, may, without prejudice to any other remedy that he or she may have in law, apply *ex parte* to a judge in chambers for an order-

- (a) directing the sheriff or another person designated by the court (hereafter referred to as a designated person) to enter upon or enter any specified place or premises accompanied by such other persons as the court may specify (if any) and there to search for, and, if found, seize and remove, such documents, records or other material as the court may specify and any such goods, alleged to be counterfeit goods, as may be so specified (hereafter referred to as subject goods), that are at, on or in such place or premises, and to attach such documents, records, material and goods;
- (b) directing the respondent to point out to the sheriff or designated person all subject goods and to disclose and make available to him or her all documents and material that are relevant in order to determine whether the subject goods in question are counterfeit goods or are relevant to any

transactions or dealings in counterfeit goods at, on or in the relevant place or premises or elsewhere, and to permit the sheriff or designated person to attach such subject goods, as well as such documents and material (hereafter jointly referred to as ancillary materials) and remove them for detention in safe custody;

- (c) restraining the respondent from-
 - (i) interfering with the state of the subject goods or ancillary materials during the search, seizure, attachment or removal;
 - (ii) carrying out or continuing with the act of dealing in counterfeit goods that gave rise to the application;
- (d) granting such further or alternative relief as the court considers appropriate.

(2) An application in terms of subsection (1) will be heard *in camera* unless the court is satisfied that the attendance of the proceedings by members of the public or any class or group of such members will not cause the applicant to suffer any prejudice or to be prejudiced when seeking to protect or enforce his or her relevant intellectual property right, and that such attendance, should the court order the relief sought, will not impair or detract from the efficacy of the order or the execution thereof.

(3) The court will not grant an application brought in terms of subsection (1) unless it considers that the applicant has a *prima facie* claim against the respondent for the infringement of an intellectual property right and that-

- (a) the applicant's right to discovery of documents in any proceedings to be instituted by him or her is likely to be frustrated, either by reason of the nature of the suspected counterfeit goods in relation to which the application is made or due to other circumstances; or
- (b) should the normal court procedure be followed or implemented, the goods relevant to the issues in those proceedings, or evidence in connection with transactions or dealings with the latter goods, are likely to be destroyed or to be so altered or placed or be otherwise disposed of in such manner as to effectively preclude the applicant from having access to the relevant goods.

(4) A court hearing an application so brought, may order that the relief applied for, be granted, subject to the terms and conditions specified in the order, or that relief be refused, or may make any other order that it deems just and appropriate in the circumstances.

(5) For the purposes of subsection (4), the court may-

- (a) order that the sheriff or designated person may rely upon the assistance of knowledgeable persons, specified in the order, in identifying the subject goods and ancillary materials;
- (b) order the applicant to furnish security to the respondent in an appropriate amount equal to a specified percentage of the value of the goods attached;
- (c) issue an order restraining the respondent *pendente lite* from infringing the applicant's intellectual property right;
- (d) issue a rule *nisi* calling upon the respondent to show cause before or on a specified day (which must fall on a date within 20 court days of the granting of the rule *nisi*) why an interdict restraining the respondent from

infringing the applicant's intellectual property right and any order granting the applicant further relief, including an order directing the delivery of the subject goods up to the applicant, should not be granted or confirmed;

- (e) order that the applicant, should he or she wish to institute proceedings against the respondent for the infringement of the applicant's intellectual property right, must do so not later than the date specified in the order.

(6) If the court has not made an order in terms of subsection (5) (e), an applicant who wishes to institute the proceedings contemplated in that subsection must do so within 20 court days of the date of the order made in terms of subsection (4) and whereby his or her application was granted.

12 Provisions relating to execution of court order authorising search for counterfeit goods and evidence relevant thereto

(1) When the court in terms of section 11 (4) has issued an order authorising a search of any place or premises, the respondent will be entitled to have his or her attorney present during the search and further execution of the order at, on or in such place or premises, if the presence of that attorney can be secured with due speed after the sheriff or designated person has arrived at the place or premises with a view to conducting that search and further executing that order.

(2) The sheriff or designated person, for the purpose of conducting the search, must be accompanied by the applicant's attorney who, after service, at the place or premises where the search is to be conducted, of a copy of the application and order on the respondent, or, if the respondent is not present, on a responsible person ostensibly in control of such place or premises, must explain the terms of the order to the respondent or that person and inform him or her that the respondent is entitled to have his or her attorney present during the execution of the order provided the presence of the respondent's attorney is secured with due speed.

(3) The sheriff or designated person conducting the search, must-

- (a) prepare an inventory of the subject goods and ancillary materials attached by him or her on the authority of an order in terms of section 11 (4) and furnish a copy of the inventory to the applicant and to the respondent;
- (b) allow the parties to peruse the ancillary materials that have been so attached and to make copies thereof or excerpts therefrom; and
- (c) allow the parties to inspect the subject goods and to have those goods tested or analysed on their behalf.

(4) When a search authorised by an order in terms of section 11 (4) has been completed, the applicant's attorney must, without delay-

- (a) make a statement under oath or affirmation in which he or she reports fully on the conducting of the search and on any other steps taken by him or her in relation to or pursuant to the search with a view to complying with the requirements of that order or an order in terms of section 11 (5) and the requirements imposed by this section, and, where any subject goods or ancillary materials have been attached on the authority of an order in terms of section 11 (4), annex to that statement a copy of the inventory prepared in relation to the relevant subject goods and ancillary materials in compliance with subsection (3) of this section;

- (b) cause the original of that statement, together with its annex, to be filed in the office of the registrar of the court in question and cause a certified copy thereof to be served on the respondent.

13 Court may order unsuccessful claimant in proceedings for infringement of intellectual property right to pay compensation

(1) Where in any proceedings the claim of a person (hereafter called the erstwhile applicant) in respect of an infringement of his or her intellectual property right is dismissed, the court may order the erstwhile applicant to pay appropriate compensation to the erstwhile respondent for any injury or prejudice caused to or suffered by him or her in consequence of any measures and steps taken in terms of section 11 or 12 on the authority of an order contemplated in section 11.

(2) For the purposes of subsection (1) and section 14-

- (a) **'erstwhile applicant'** means the owner of an intellectual property right who was the successful applicant in any *ex parte* application brought in terms of section 11 (1); and
- (b) **'erstwhile respondent'** means the person against or in relation to whom relief was sought pursuant to that application.

14 Court may order release of attached subject goods and ancillary materials in certain circumstances

If an erstwhile applicant does not, before the date specified in an order contemplated in section 11 (5) (e) or within the period referred to in section 11 (6), whichever is applicable, institute proceedings against the erstwhile respondent for the infringement of the erstwhile applicant's intellectual property right, or if, in the case where those proceedings have been so instituted, the erstwhile applicant's claim has been dismissed by the court, the court, on the application of the erstwhile respondent or any other interested person claiming to be entitled to the subject goods and ancillary materials, may order that such goods and materials be released, respectively, to the erstwhile respondent or to such interested person who has proved his or her entitlement thereto.

15 Customs authorities' powers in relation to counterfeit goods being imported into Republic

(1) The owner of an intellectual property right may apply to the Commissioner for Customs and Excise (hereafter called the Commissioner), to seize and detain all goods-

- (a) which are counterfeit goods featuring, bearing, embodying or incorporating the subject matter of that intellectual property right or to which the subject matter of that right has been applied;
- (b) and which are imported into or enter the Republic during the period specified in the application. However, that period may not extend beyond the last day of the period for which that intellectual property right subsists.

(2) For the purposes of subsection (1), the applicant may furnish to the Commissioner a specimen of the goods that are protected goods of the nature contemplated in paragraph (a) of the definition of 'protected goods' in section 1 (1) (if any) and to which the subject matter of his or her relevant intellectual property right

relates, and sufficient information and particulars as to the subsistence and extent of that intellectual property right and as to his or her title to that right.

(3) The Commissioner must consider and deal with an application in terms of subsection (1) without delay, and must grant the application if satisfied on reasonable grounds-

- (a) that the goods claimed to be protected goods, are *prima facie* protected goods;
- (b) that the intellectual property right, the subject matter of which relates to the protected goods, *prima facie* subsists; and
- (c) that the applicant *prima facie* is the owner of that intellectual property right.

(4) When an application made in terms of subsection (1) has been granted and notice thereof given in terms of subsection (5), all goods that are counterfeit goods of the type with reference to which that application was made (hereafter called the stipulated goods), or suspected on reasonable grounds to be stipulated goods, and imported into or entering the Republic from time to time during the period determined by the Commissioner (which may be shorter than the period applied for), may be seized and detained by the customs authorities in performing their functions under the Customs and Excise Act, 1964 (Act 91 of 1964), subject to the provisions of subsections (6) and (7) of this section.

(5) The Commissioner, by written notice (issued within a reasonable time after having decided the application) must notify the applicant whether the application has been granted or refused, and-

- (a) if granted, state the period during which any stipulated goods being imported into or entering the Republic will be made subject to seizure and become subject to detention under subsection (4);
- (b) if refused, state the reasons for the refusal.

(6) For the purposes of acting under subsection (4) in relation to goods that are stipulated goods or suspected on reasonable grounds to be stipulated goods-

- (a) any member of the customs authorities will act *mutatis mutandis* as if he or she were an inspector who, in connection with counterfeit goods or alleged or suspected counterfeit goods, were exercising the powers contemplated in section 4 (1) on own initiative in terms of section 3 (4);
- (b) the following provisions of this Act will apply *mutatis mutandis* in relation to any member of the customs authorities, namely-
 - (i) the provisions in accordance with or subject to which the powers contemplated in section 4 (1) may be exercised by an inspector so acting on own initiative;
 - (ii) the provisions by which any other power or any right, function, duty, obligation, exemption, indemnity or liability is conferred or imposed on an inspector so acting.

However, the Minister, at the request of the Minister of Finance acting on the recommendation of the Commissioner, may by notice in the *Gazette* exempt the members of the customs authorities from any of the provisions made applicable by this paragraph if satisfied that there are suitable and

appropriate alternative arrangements made by or under the Customs and Excise Act, 1964, that cover the purpose of the provision from which exemption is sought.

(7) The customs authorities will not be obliged to act in terms of subsection (4) unless the owner of the intellectual property right, the subject matter of which is alleged to be featured or borne by or incorporated or embodied in or to have been applied to stipulated goods, furnishes to the Commissioner security in the manner and amount that the Commissioner may require to indemnify the customs authorities and their members against any liability that may be incurred pursuant to the seizure and detention of goods or anything done in relation to goods when acting or purportedly acting under this section, and to cover any expenses that may be incurred in effecting the seizure and detention of the goods.

(8) The provisions of this Act will not be construed so as to render the customs authorities or any of their members liable for-

- (a) any failure to detect or seize stipulated goods;
- (b) the inadvertent release of any such goods; or
- (c) any action taken in good faith in respect of such goods.

(9) For the purposes of this section, '**customs authorities**' means the South African Revenue Service in its Division: Customs and Excise, the members of which are the Commissioner and those officials who are 'officers' within the contemplation of the definition of 'officer' in section 1 (1) of the Customs and Excise Act, 1964.

16 Evidence and presumptions

(1) Subject to section 5 (4) (b), any statement taken down or other documentary evidence procured by an inspector in the course of exercising any power in terms of section 4 (1), may be made available to a complainant at his or her request. The complainant may make copies of or extracts from any such statement or documentary evidence and must return the original statement or document to the inspector.

(2) An inspector may be called as a witness by any party to civil or criminal proceedings concerning counterfeit goods, or by the court, whenever the inspector's conduct, the exercise or performance of his or her powers or duties in terms of section 4 (1), 5, 6, 7 or 9 or the nature of the circumstances in or activities with reference to which those powers or duties were exercised or performed, is in issue or relevant in those proceedings.

(3) In any civil proceedings concerning an act of dealing in counterfeit goods by any person, it will be permissible, if relevant, to present evidence about that person's conviction on account of an offence founded on the same act of dealing in counterfeit goods.

(4) (a) A statement in the prescribed form, made under oath or affirmation by an inspector, to the effect that the goods specified under his or her signature in the inventory attached to that statement, are goods seized by him or her from a specified person at a specified place and on a specified date, will, upon production to the court, be admissible in evidence and be sufficient proof of the facts stated therein in any civil or criminal proceedings concerning counterfeit goods or any act of dealing therein, if

relevant to those proceedings and if the inventory has been prepared by the inspector, and has been certified to be correct, as required by section 7 (1) **(a)**.

(b) If a statement has been produced and handed in as evidence in terms of paragraph **(a)**, the court, in its discretion and notwithstanding the provisions of that paragraph, may order that the inspector who made that statement be directed or subpoenaed to appear before the court to give oral evidence concerning any matter mentioned or dealt with in that statement.

(5) Where the subsistence of an intellectual property right in respect of protected goods or any person's title to or interest in such intellectual property right is in issue in any civil or criminal proceedings concerning counterfeit goods, the subsistence of, title to or interest in such intellectual property right, where it is alleged-

- (a)** to encompass the rights in respect of a trade mark as contemplated in paragraph **(a)** of the definition of 'intellectual property right' in section 1 (1), may be proved in accordance with the provisions of sections 49, 50 and 51 of the Trade Marks Act, 1993;
- (b)** to be copyright in a work, may be proved in accordance with the provisions of section 26 (12) of the Copyright Act, 1978, which provisions will apply *mutatis mutandis*;
- (c)** to be the exclusive right to use a particular mark, conferred by a notice issued under section 15 of the Merchandise Marks Act, 1941, may be proved by producing to the court a copy of the **Gazette** in which that notice was published, accompanied by a statement under oath or affirmation made by the Minister or any officer in the Department of Trade and Industry designated by the Minister, which is to the effect that such notice has not been withdrawn or amended in its essence.

However, the provisions of this subsection will not be construed so as to detract from the power of the court, in relation to any such matter or any aspect thereof-

- (i) to require oral evidence to be given;
- (ii) in the case of a High Court, to order that the evidence of a person who resides or is for the time being outside the area of jurisdiction of that Court, be taken by means of interrogatories.

(6) Where any person who conducts business in protected goods featuring, bearing, incorporating or embodying the subject matter of a particular intellectual property right is proved to have been found in possession of suspected counterfeit goods to which the subject matter of the same intellectual property right has been applied-

- (a)** it will, in any civil proceedings concerning an act of dealing in counterfeit goods founded on that person's possession of the suspected counterfeit goods, be presumed, until the contrary is proved, that such person was in possession of the latter goods for the purpose of dealing therein if the quantity of those goods is more than that which, in the circumstances, reasonably may be required for his or her private and domestic use;
- (b)** the same presumption will, in any criminal proceedings arising from that person's possession of the suspected counterfeit goods, apply *mutatis mutandis* unless credible evidence in rebuttal of the fact presumed, is tendered.

17 Liability for damage or loss arising pursuant to application of Act

(1) Any person suffering damage or loss caused by the wrongful seizure, removal or detention of goods alleged to be counterfeit goods, or by any action contemplated in section 7 (1) **(a)**, **(b)** or **(c)** or (2) wrongfully taken by an inspector with reliance on that section read with section 4 (1), or caused during or pursuant to the seizure, removal or detention of such goods in terms of this Act, will be entitled to claim compensation for that damage or loss which claim, subject to subsection (2), will be against the complainant and not against the State, the inspector or the person in charge of the counterfeit goods depot where those goods are or were detained.

(2) The State or such inspector or the person in charge of the relevant counterfeit goods depot, as the case may be, will be liable in respect of a claim contemplated in subsection (1) only if-

- (a)** in the seizure or removal of the alleged counterfeit goods, the inspector, or, in the detention and storage of those goods, that person so in charge or the inspector (depending on the circumstances), has been grossly negligent; or
- (b)** the inspector or that person so in charge (as the case may be), in the seizure, removal, detention or storage of those goods, acted in bad faith.

(3) Any reference in paragraphs **(a)** and **(b)** of subsection (2) to an inspector or to a person in charge of a counterfeit goods depot (however expressed) will be construed so as to include any person acting on the instruction or under the supervision of the inspector or the person so in charge, as the case may be.

18 Miscellaneous offences

A person will be guilty of an offence-

- (a)** upon failing to comply with any request, direction, demand or order made or given by an inspector in accordance with the provisions of this Act;
- (b)** when obstructing or hindering an inspector in performing his or her functions under this Act;
- (c)** if that person, without the necessary authority, breaks, damages or tampers with a seal applied by an inspector in terms of this Act or removes any goods, documents, articles, items, objects or things sealed or sealed-off by an inspector or detained or stored at a counterfeit goods depot in terms of this Act; or
- (d)** when, if asked in terms of section 5 (1) **(f)** for information or an explanation relating to a matter within the knowledge of that person, he or she-
 - (i) refuses or fails to give that information or explanation; or
 - (ii) gives information or an explanation knowing it to be false or misleading.

19 Penalties

(1) Any person convicted of an offence referred to in section 2 (2), will be punishable-

- (a)** in the case of a first conviction, with a fine, in respect of each article or item involved in the particular act of dealing in counterfeit goods to which

the offence relates, that may not exceed R5 000,00 per article or item, or with imprisonment for a period that may not exceed three years, or with both such a fine and such term of imprisonment;

- (b) in the case of a second or any subsequent conviction, with a fine, in respect of each such article or item, that may not exceed R10 000,00 per article or item, or with imprisonment for a period that may not exceed five years, or with both such a fine and such term of imprisonment.

(2) Any person convicted of an offence referred to in section 18, will be punishable with a fine or imprisonment for a period that may not exceed six months.

(3) (a) A court that has convicted a person of an offence contemplated in section 2 (2) must, when considering which penalty to impose, amongst others take into account any risk to human or animal life, health or safety or danger to property (whether movable or immovable) that may arise from the presence or use of the counterfeit goods in question.

(b) Without detracting from the discretion that a court in criminal proceedings has with regard to sentencing, a court that has convicted any person of an offence referred to in section 2 (2) may take into account, in mitigation of sentence, any evidence to the effect that such person, fully, truthfully and to the best of his or her ability had disclosed to an inspector who acted against him or her in terms of section 4 (1) or to a member of the South African Police Service who investigated that offence, all information and particulars available to that person in relation to any one or more, or all, of the following matters (whichever may have been applicable in the circumstances):

- (i) The source from which the counterfeit goods involved in the commission of the offence, were obtained;
- (ii) the identity of the persons involved in the importation, exportation, manufacture, production or making of those counterfeit goods;
- (iii) the identity and, if reasonably demanded, the addresses or whereabouts of the persons involved in the distribution of those goods;
- (iv) the channels for the distribution of those goods.

(4) (a) The Minister may from time to time by notice in the *Gazette* increase the amounts of the fines mentioned in paragraphs (a) and (b) of subsection (1).

(b) That notice must be laid on the table in the National Assembly, for its consideration and approval, within 14 days after the date on which it is published in the *Gazette*, if the National Assembly is then in session, or, if it is not then in session, within 14 days of the commencement of its next session.

20 Orders permissible following conviction of person of offence contemplated in section 2 (2)

(1) Subject to section 10, the court having convicted a person of an offence contemplated in section 2 (2) may declare the counterfeit goods in question to be forfeited to the State or order that those goods and their packaging, and, where applicable, any tools that were used by or on behalf of the convicted person for the manufacturing, production or making of those or any other counterfeit goods or for the unlawful application to goods of the subject matter of any intellectual property right, be destroyed.

(2) Any person who submits any counterfeit goods purchased by him or her (hereafter called the aggrieved person), to an inspector, together with proof of the price that was paid for those goods, will be entitled to receive payment of a sum of money equivalent to three times the amount of that price, in the following circumstances:

- (a) The person who had sold those counterfeit goods must have been convicted of an offence referred to in section 2 (2) founded on the sale of those goods. Alternatively, an order, against the seller, must have been made in terms of section 10 (1) (a) directing that those goods be delivered up to the owner of the intellectual property right, the subject matter of which was unlawfully applied to those goods, or up to a complainant deriving his or her title from that owner.
- (b) The aggrieved person must have co-operated fully in the prosecution of the seller for that offence.
- (c) When the court having so convicted the seller of those goods or having made an order in terms of section 10 (1) (a), has also issued an order awarding that sum of money to the aggrieved person and directing the seller to pay that award. However, the court must make the latter order if satisfied that the requirements of paragraphs (a) and (b) have been met.

(3) The provisions of subsection (2) will apply and be applied, *mutatis mutandis*, in relation to and for the benefit of any person who, otherwise than by way of a transaction of purchase and sale, has acquired, in consideration for value given by him or her, goods that are counterfeit goods.

21 Civil or criminal liability under other laws and institution of civil or criminal proceedings thereunder not affected by this Act

Subject to the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and the Criminal Procedure Act, 1977 (Act 51 of 1977), the provisions of this Act do not detract from a person's civil or criminal liability, in terms of any other law, on account of his or her infringement of any intellectual property right or from the capacity or competence in terms of any law to institute civil or criminal proceedings in respect of such infringement.

[S. 21 substituted by s. 3 of Act 25 of 2001.]

22 Minister's power to appoint or designate inspectors

(1) The Minister may appoint any fit and proper person as an inspector for the purposes of this Act.

(2) (a) The Minister, by notice in the *Gazette*, may designate any specified class or category of persons to be inspectors for the purposes of this Act.

(b) The Minister, in a like manner, may amend or withdraw such a notice at any time.

(3) The Minister or any official acting under the authority of the Minister, must issue to each of the inspectors contemplated in this section a certificate in the prescribed form stating that the person in whose name it has been issued has been appointed or designated an inspector (as the case may be) in terms of or by virtue of this Act.

23 Minister's powers regarding counterfeit goods depots

(1) The Minister, by notice in the *Gazette*, may from time to time designate any place defined in the notice to be a counterfeit goods depot for the purposes of this Act, and may in a like manner amend or withdraw such a notice at any time.

(2) The Minister must in respect of a counterfeit goods depot appoint any fit and proper person as the person in charge of the counterfeit goods depot.

24 Regulations

The Minister may make regulations not inconsistent with the provisions of this Act-

- (a) in relation to any matter which, in terms of this Act, may or must be prescribed;
- (b) prescribing any inventory to be prepared or made in terms of this Act;
- (c) that may be necessary or expedient for the proper and effective control, management and administration of a counterfeit goods depot and the proper care of the goods detained therein;
- (d) in relation to the manner or form in which any application (other than any application to a court of law) is to be made in terms of this Act, and may prescribe forms for that purpose; and
- (e) in relation to any other administrative or procedural matters that may be necessary or expedient for the proper and effective administration of this Act.

25 This Act binding on State

This Act binds the State.

26 Short title and commencement

This Act will be called the Counterfeit Goods Act, 1997, and will come into operation on a date to be determined by the President by proclamation in the *Gazette*.

COUNTERFEIT GOODS AMENDMENT ACT 25 OF 2001

[ASSENTED TO 24 OCTOBER 2001]

[DATE OF COMMENCEMENT: 30 OCTOBER 2001]

(English text signed by the President)

ACT

To amend the Counterfeit Goods Act, 1997, so as to amend the definition of 'intellectual property right'; to make further provision regarding an inspector's powers in relation to counterfeit goods; and to effect a technical correction; and to provide for matters connected therewith.

1

Amends section 1 of the Counterfeit Goods Act 37 of 1997 by substituting paragraph **(a)** of the definition of 'intellectual property right'.

2

Amends section 5 of the Counterfeit Goods Act 37 of 1997, as follows: paragraph **(a)** substitutes subsection (4) **(a)**; and paragraph **(b)** inserts subsection (4A).

3

Substitutes section 21 of the Counterfeit Goods Act 37 of 1997.

4 Short title and commencement

This Act is called the Counterfeit Goods Amendment Act, 2001.

TRADE MARKS ACT 194 OF 1993

[ASSENTED TO 22 DECEMBER 1993]

[DATE OF COMMENCEMENT: 1 MAY 1995]

(Afrikaans text signed by the State President)

as amended by

Intellectual Property Laws Amendment Act 38 of 1997
Companies Act 71 of 2008

Regulations under this Act

ACT

To provide for the registration of trade marks, certification trade marks and collective trade marks; and to provide for incidental matters.

PART I ***INTRODUCTION (ss 1-4)***

1 Division of Act into parts

This Act is divided into 18 parts, which relate to the following matters respectively:

- PART I Introduction (sections 1 to 4)
- PART II Administration (sections 5 to 8)
- PART III Registrable Trade Marks (sections 9 to 15)
- PART IV Application for Registration (sections 16 to 20)
- PART V Opposition (section 21)
- PART VI Register of Trade Marks (sections 22 to 28)
- PART VII Registration and its Effects (sections 29 to 32)
- PART VIII Infringement (sections 33 to 36)
- PART IX Duration and Renewal of Registration (section 37)
- PART X Permitted Use and Registered Users (section 38)
- PART XI Assignment and Hypothecation (sections 39 to 41)
- PART XII Certification Trade Marks and Collective Trade Marks (sections 42 and 43)
- PART XIII Powers and Duties of Registrar (sections 44 to 48)
- PART XIV Evidence (sections 49 to 62)
- PART XV Appeals to and Powers of Court (sections 53 to 59)
- PART XVI Offences (sections 60 to 62)
- PART XVII International Arrangements (section 63)
- PART XVIII Miscellaneous (sections 64 to 72)

2 Definitions

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

'agent' means any person whose name has been entered in the register referred to in section 8 (2), or a patent agent or an attorney;

'assignment' means assignment by act of the parties concerned, and **'assign'** or **'assignable'** has a corresponding meaning;

'certification trade mark' means a mark registered or deemed to have been registered under section 42;

'collective trade mark' means a mark registered under section 43;

'Commission' means the Companies and Intellectual Property Commission, established by section 185 of the Companies Act, 2008;

[Definition of 'Commission' inserted by s. 224 (2) of Act 71 of 2008.]

'convention country' means any country or group of countries in respect of which there is in force a proclamation under section 63 declaring such country or group of countries to be a convention country or convention countries for the purposes of this Act;

'court' means the Transvaal Provincial Division of the Supreme Court of South Africa, but in relation to any claim or counterclaim for removal, amendment or variation of, or other relief affecting any entry in, the register arising from or forming part of proceedings instituted in any other division of the said Supreme Court having jurisdiction in relation to the proceedings, includes that division in respect of such claim or counterclaim;

'deed of security' means a written instrument signed by the proprietor of a registered trade mark hypothecating the registered trade mark;

'device' means any visual representation or illustration capable of being reproduced upon a surface, whether by printing, embossing or by any other means;

'limitation' means any limitation of the exclusive right to the use of a trade mark given by the registration thereof, including a limitation of that right as to the mode of use, as to use in relation to goods to be sold, or otherwise traded in, or as to services to be performed, in any place within the Republic, or as to use in relation to goods to be exported from the Republic;

'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;

'Minister' means the Minister of Trade and Industry;

'Paris Convention' means the Paris Convention on the Protection of Industrial Property of 20 March 1883 as revised or amended from time to time and as acceded to by the Republic;

'patent agent' means a patent agent registered or deemed to be registered as such under the Patents Act, 1978 (Act 57 of 1978);

'prescribed' means prescribed by regulation;

'register' means the register of trade marks kept at the trade marks office in terms of section 22;

'registered trade mark' means a trade mark registered or deemed to be registered under this Act;

'registered user' means a person who is for the time being registered as such under section 38;

'registrar' means the Commissioner, appointed in terms of section 189 of the Companies Act, 2008;

[Definition of 'registrar' substituted by s. 224 (2) of Act 71 of 2008.]

'regulation' means any regulation made under this Act;

'repealed Act' means the Trade Marks Act, 1963 (Act 62 of 1963);

'services' includes the offering for sale or the sale of goods in the retail or wholesale trade;

'this Act' includes the regulations;

'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;

'trade marks office' means the office of the Commission;

[Definition of 'trade marks office' inserted by s. 224 (2) of Act 71 of 2008.]

'transmission' means transfer by operation of law, not being assignment, and 'transmit' and 'transmissible' have corresponding meanings.

(2) References in this Act to the use of a mark shall be construed as references to-

- (a) the use of a visual representation of the mark;
- (b) in the case of a container, the use of such container; and
- (c) in the case of a mark which is capable of being audibly reproduced, the use of an audible reproduction of the mark.

(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.

(4) The use or proposed use of a registered trade mark shall include the use or proposed use of the trade mark in accordance with the provisions of section 38, whether for the purposes of this Act or at common law.

3 Application of Act to trade marks registered under repealed Act

(1) Subject to the provisions of section 70, this Act shall apply to all trade marks registered or deemed to be registered under the repealed Act, whether in Part A or Part B of the register kept under that Act.

(2) All applications and proceedings commenced under the repealed Act shall be dealt with in accordance with the provisions of that Act as if it had not been repealed.

4 Act binds State

This Act shall bind the State.

PART II
ADMINISTRATION (ss 5-8)

5

[S. 5 repealed by s. 224 (2) of Act 71 of 2008.]

6 Registrar of trade marks

(1) The Commission-

(a) may exercise the powers and must perform the duties conferred or imposed upon the registrar by this Act; and

(b) is responsible for the administration of the trade marks office.

[Sub-s. (1) substituted by s. 224 (2) of Act 71 of 2008.]

(2)

[Sub-s. (2) repealed by s. 224 (2) of Act 71 of 2008.]

(3) The Minister may appoint, whenever he may deem it necessary, a judge as defined in section 1 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989), or a judge who has been discharged from active service in terms of section 3 of the said Act, or an advocate or an attorney of the Supreme Court of South Africa, to exercise any power or to perform any duty conferred or imposed upon the registrar in terms of this Act, and for the purposes of this Act the exercise of such power or the performance of such duty shall be deemed to have been done by the registrar.

(4)

[Sub-s. (4) repealed by s. 224 (2) of Act 71 of 2008.]

7 Seal of trade marks office

There shall be a seal of the trade marks office, and the impression of the seal shall be judicially noticed.

8 Unauthorized persons not to act in trade mark matters

(1) The registrar shall permit an agent to perform on behalf of the person for whom he is agent, any act in connection with registration under this Act or any proceedings relating thereto, and shall not permit a person other than an agent so to act.

(2) There shall be kept at the trade marks office a register in which shall be entered the full names and addresses of all persons whose names and addresses were entered in the register referred to in section 8 (2) of the repealed Act.

PART III
REGISTRABLE TRADE MARKS (ss 9-15)

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 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 38 of 1997.]

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

(8) (a) a mark which consists of or contains the national flag of the Republic or a convention country, or an imitation from a heraldic point of view, without the authorization of the competent authority of the Republic or convention country, as the case may be, unless it appears to the registrar that use of the flag in the manner proposed is permitted without such authorization;

(b) a mark which consists of or contains the armorial bearings or any other state emblem of the Republic or a convention country, or an imitation from a heraldic point

of view, without the authorization of the competent authority of the Republic or convention country, as the case may be;

(c) a mark which consists of or contains an official sign or hallmark adopted by the Republic or a convention country, or an imitation from a heraldic point of view, and which indicates control and warranty, in relation to goods or services of the same or a similar kind as those in relation to which it indicates control and warranty, without the authorization of the competent authority of the Republic or convention country, as the case may be;

(d) a mark which consists of or contains the flag, the armorial bearings or any other emblem, or an imitation from a heraldic point of view, or the name, or the abbreviation of the name, of any international organization of which one or more convention countries are members, without the authorization of the organization concerned, unless it appears to the registrar that use of the flag, armorial bearings, other emblem or imitation or the name or abbreviation in the manner proposed, is not such as to suggest to the public that a connection exists between the organization and the mark, or is not likely to mislead the public as to the existence of a connection between the organization and the proprietor of the mark:

Provided that-

- (i) paragraphs **(b)**, **(c)** and **(d)** shall apply to a state emblem and an official sign or hallmark of a convention country and an emblem, the name, or the abbreviation of the name, of an international organization only if and to the extent that-
 - (aa)** the convention country or international organization, as the case may be, has notified the Republic in accordance with Article **6ter** of the Paris Convention that it desires to protect that emblem, official sign or hallmark, name or abbreviation, as the case may be;
 - (bb)** such notification remains in force; and
 - (cc)** the Republic has not objected to it in accordance with Article **6ter** of the Paris Convention or any such objection has been withdrawn;
- (ii) paragraph **(b)**, **(c)** or **(d)** shall apply only in relation to applications for registration made more than two months after receipt of the notification referred to in paragraph (i) **(aa)**;
- (iii) paragraph **(b)** or **(c)** shall not prevent the registration of a trade mark by a citizen of any country who is authorized to make use of a state emblem or official sign or hallmark of that country, notwithstanding the fact that it is similar to that of another country;

[Para. (8) substituted by s. 59 **(c)** of Act 38 of 1997.]

(9) a mark which contains any word, letter or device indicating State patronage;

(10) a mark which contains any mark specified in the regulations as being for the purposes of this section a prohibited mark;

(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 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.

11 Registration to be in respect of particular goods or services

(1) A trade mark shall be registered in respect of goods or services falling in a particular class or particular classes in accordance with the prescribed classification: Provided that the rights arising from the registration of a trade mark shall be determined in accordance with the prescribed classification applicable at the date of registration thereof.

(2) Where a trade mark has, either before or after the commencement of this Act, been registered as contemplated in subsection (1) and, during the subsistence of that registration, the prescribed classification in accordance with which the trade mark was registered as aforesaid is revised or is replaced by a new classification, the proprietor of the trade mark may, at any time, apply in the prescribed manner for revision, in

accordance with the revised or new classification, of the class or classes in which the trade mark is registered.

[Sub-s. (2) substituted by s. 60 of Act 38 of 1997.]

(3) If the revised or new classification referred to in subsection (2) results in two or more identical trade marks owned by the same proprietor which were under the previous registration registered in separate classes, falling within a single class, such marks shall, if they have the same registration date, be consolidated as one registration in the revised or new class, or if as a result of the revised or new classification a trade mark is required to be recorded in more than one class, such mark shall be deemed to be separately registered in each such class and shall be treated as a separate trade mark for the purposes of renewal thereof in each class.

12 Name or representation of person

Where application is made for registration of a trade mark which consists of or includes the name or representation of a person, the registrar may require the applicant to furnish him with the consent of that person or, where such person is deceased, of his legal representative, to the name or representation appearing in the trade mark.

13

[S. 13 repealed by s. 61 of Act 38 of 1997.]

14 Honest concurrent use

(1) In the case of honest concurrent use or of other special circumstances which may make it proper to do so, the registrar may, on application in the prescribed manner, register, subject to such conditions and limitations, if any, as he may think fit to impose, a trade mark the registration of which would otherwise offend against the provisions of paragraph (6), (14), (15) or (17) of section 10.

(2) In the case of a trade mark which is sought to be removed from the register on the ground that it offends against the provisions of paragraph (6), (14), (15) or (17) of section 10, the court or the registrar, as the case may be, may, in the case of honest concurrent use or of other special circumstances which make it proper to do so, refuse to remove the trade mark from the register.

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.

PART IV **APPLICATION FOR REGISTRATION (ss 16-20)**

16 Application for registration

(1) An application for registration of a trade mark shall be made to the registrar in the prescribed manner.

(2) Subject to the provisions of this Act, the registrar shall-

- (a) accept;
- (b) accept, subject to such amendments, modifications, conditions or limitations, as he may deem fit;
- (c) provisionally refuse; or
- (d) refuse,

the application.

(3) The registrar shall advise an applicant for registration in writing within a reasonable period from the date of the application of his decision in terms of subsection (2).

(4) In the case of an acceptance in terms of subsection (2) **(b)** or a refusal in terms of subsection (2) **(d)**, the registrar shall, on application by the applicant in the prescribed manner, state in writing the grounds for his decision.

(5) The registrar or the court, as the case may be, may at any time, whether before or after acceptance of the application, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such conditions as the registrar or the court, as the case may be, may think fit.

17 Advertisement of accepted application

When an application for registration of a trade mark has been accepted, the applicant shall, as soon as may be after acceptance, cause the application as accepted to be advertised in the prescribed manner.

18 Registration of parts of trade marks

(1) Where the proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he may apply to register the whole and any such part as separate trade marks.

(2) Each such separate trade mark must satisfy all the requirements for registration of a trade mark under this Act and shall for all purposes be a registered trade mark.

19 Proposed use of trade mark by body corporate to be established

(1) No application for the registration of a trade mark in respect of any goods or services shall be refused, nor shall acceptance thereof be withheld, on the ground only that the applicant does not use or propose to use the trade mark, if the registrar is satisfied that a body corporate is about to be established and that the applicant

intends to assign the trade mark to the body corporate with a view to the use thereof in relation to those goods or services by the body corporate: Provided that the trade mark shall only be registered once the registrar has been placed in a position to register the assignment in terms of section 40 simultaneously with the registration of the trade mark.

(2) For the purposes of subsection (1) **(a)** of section 27 the intention referred to in that subsection shall, in relation to a trade mark registered by virtue of subsection (1) of this section, be an intention on the part of the applicant that the trade mark be used by the body corporate concerned.

20 Non-completed applications

(1) If, by reason of default on the part of the applicant, after acceptance of the application, the registration of a trade mark has not been completed within six months from the date of such acceptance, the registrar shall give notice of the non-completion to the applicant, and, if at the expiration of two months from that notice or of such further time as the registrar may allow, the registration is not completed, the application shall be deemed to have been abandoned.

(2) If the application is refused or is conditionally accepted and the applicant, having been advised of the registrar's objection to the application, or of his conditions for acceptance, fails to take such steps as are available to him under this Act within three months of the date of such advice, or such further time as the registrar may allow, the application shall be deemed to have been abandoned.

PART V OPPOSITION (s 21)

21 Opposition to registration

Any interested person may, within three months from the date of the advertisement of an application in terms of section 17 or within such further time as the registrar may allow, oppose the application in the manner prescribed.

PART VI REGISTER OF TRADE MARKS (ss 22-28)

22 Register

(1) There shall be kept at the trade marks office a register of trade marks, in a form decided by the registrar, in which shall be entered the prescribed particulars.

(2) The register kept under the repealed Act and existing at the commencement of this Act shall be incorporated with and form part of the register kept under this Act.

(3) The register shall comprise all trade marks which are registered or are deemed to be registered under this Act.

(4) The register shall be open at all convenient times during office hours to inspection by the public.

(5) A certified copy of an entry in the register shall be given to any person who applies for such a copy in the prescribed manner.

23 Amendment of register

(1) The registrar may correct any error in the register made by an official of his office.

(2) The registrar may, on request made in the prescribed manner by the registered proprietor of a trade mark, amend or alter the register by-

- (a) correcting any error in the name or address of the registered proprietor of the trade mark or any error in the register relating to such trade mark;
- (b) altering the name or address or address for service of the registered proprietor who has changed his name or address or address for service;
- (c) cancelling the registration of the trade mark;
- (d) deleting any goods or services or classes of goods or services from those in respect of which the trade mark is registered; or
- (e) entering a disclaimer or memorandum relating to the trade mark which does not in any way extend the rights given by the registration of the trade mark.

(3) The registrar may, on request made in the prescribed manner by the registered proprietor or a registered user of a trade mark, enter in the register any change in the name or address of such registered user.

24 General power to rectify entries in register

(1) In the event of non-insertion in or omission from the register of any entry, or of an entry wrongly made in or wrongly remaining on the register, or of any error or defect in any entry in the register, any interested person may apply to the court or, at the option of the applicant and subject to the provisions of section 59, in the prescribed manner, to the registrar, for the desired relief, and thereupon the court or the registrar, as the case may be, may make such order for making, removing or varying the entry as it or he may deem fit.

(2) The court or the registrar, as the case may be, may in any proceedings under this section decide any question that may be necessary or expedient to decide in connection with the rectification of the register.

(3) In the event of the registrar being satisfied that any entry relating to the registration, assignment or transmission of a trade mark has been secured *mala fide* or by misrepresentation or that any such entry was wrongly made or wrongly remains on the register, he shall also have *locus standi* to apply to the court under the provisions of this section.

25 Alteration of registered trade mark

(1) The registered proprietor of a trade mark may apply in the prescribed manner to the registrar for leave to add to or alter the trade mark in any manner not substantially affecting the identity thereof, and the registrar may refuse leave or may grant it on such terms and subject to such limitations as he may think fit.

(2) (a) The registrar shall require the applicant to advertise the grant of the application in the prescribed manner.

(b) Any interested person may, within three months from the date of the advertisement or such further period as the registrar may allow, object in the prescribed manner, to the grant of the application.

26 Power to remove or vary registration for breach of condition

(1) Any interested person may apply for the removal from the register, or a variation, of a registered trade mark if its proprietor or any person permitted to use it in terms of section 38 fails to comply with any condition entered in the register in relation to its registration.

(2) Such application may be made to the court or to the registrar.

(3) The registrar has *locus standi* to make such application to the court.

(4) The registrar or the court may make such order for removing or varying the registration of the trade mark as he or it may deem fit.

27 Removal from register on ground of non-use

(1) Subject to the provisions of section 70 (2), a registered trade mark may, on application to the court, or, at the option of the applicant and subject to the provisions of section 59 and in the prescribed manner, to the registrar by any interested person, be removed from the register in respect of any of the goods or services in respect of which it is registered, on the ground either-

- (a) that the trade mark was registered without any *bona fide* intention on the part of the applicant for registration that it should be used in relation to those goods or services by him or any person permitted to use the trade mark as contemplated by section 38, and that there has in fact been no *bona fide* use of the trade mark in relation to those goods or services by any proprietor thereof or any person so permitted for the time being up to the date three months before the date of the application;
- (b) that up to the date three months before the date of the application, a continuous period of five years or longer has elapsed from the date of issue of the certificate of registration during which the trade mark was registered and during which there was no *bona fide* use thereof in relation to those goods or services by any proprietor thereof or any person permitted to use the trade mark as contemplated in section 38 during the period concerned; or
- (c) subject to such notice as the court or the registrar, as the case may be, shall direct, and subject to the provisions of the regulations, that, in the case of a trade mark registered in the name of a body corporate, or in the name of a natural person, such body corporate was dissolved, or such natural person died, not less than two years prior to the date of the application and that no application for registration of an assignment of such trade mark has been made in terms of section 40.

[Sub-s. (1) amended by s. 62 (a) of Act 38 of 1997.]

(2) The registrar or the court may refuse an application made under paragraph (c) of subsection (1) in relation to any goods or services if it is shown that the trade mark is used or proposed to be used in relation to such goods or services by a successor in title of the registered proprietor.

(3) In the case of an application in terms of paragraph **(a)** or **(b)** of subsection (1) the onus of proving, if alleged, that there has been relevant use of the trade mark shall rest upon the proprietor thereof.

(4) An applicant shall not be entitled to rely for the purposes of paragraph **(b)** of subsection (1) on any non-use of a trade mark that is shown to have been due to special circumstances in the trade and not to any intention not to use or to abandon the trade mark in relation to the goods or services to which the application relates.

(5) Subsection (1) **(a)** and **(b)** does not apply to a trade mark in respect of which protection may be claimed under the Paris Convention as a well-known trade mark within the meaning of section 35 (1) of this Act.

[Sub-s. (5) added by s. 62 **(b)** of Act 38 of 1997.]

28 Date of removal and partial removal

(1) Any order granted by the registrar or the court in relation to any entry in or omission from the register shall be deemed to operate from-

- (a)** the date of the application for such order; or
- (b)** if the registrar or the court, as the case may be, is satisfied that grounds for such order existed at an earlier date, that date.

(2) Where under this Act any grounds for the removal of the registration of a trade mark exist in respect of only some of the goods or services for which the trade mark is registered, the removal shall relate to those goods or services only.

PART VII REGISTRATION AND ITS EFFECTS (ss 29-32)

29 Registration

(1) When an application for registration of a trade mark has been accepted and advertised in the prescribed manner and either-

- (a)** the application has not been opposed and the time for notice of opposition has expired; or
- (b)** the application has been opposed and has been granted,

the registrar shall register the trade mark as on the date of the lodging of the application for registration, and that date shall, subject to the provisions of section 63, for the purposes of this Act be deemed to be the date of registration: Provided that where it appears to the registrar, having regard to matters which came to his notice after acceptance of an application, that the trade mark has been accepted in error, he may withdraw the acceptance and proceed as if the application had not been accepted.

(2) On the registration of a trade mark, the registrar shall issue to the applicant a certificate in the prescribed form of the registration thereof sealed with the seal of the trade marks office.

30 Certain trade marks to be associated so as to be assignable and transmissible as a whole only

(1) Where a trade mark that is registered or is the subject of an application for registration so resembles another trade mark that is registered or is the subject of an

application for registration in the name of the same proprietor that the use of both such trade marks by different persons in relation to goods or services in respect of which they are respectively registered or proposed to be registered would be likely to deceive or cause confusion, the registrar may at any time require that the trade marks be entered in the register as associated trade marks.

(2) Where a trade mark and any part or parts thereof are, by virtue of subsection (1) of section 18, registered as separate trade marks in the name of the same proprietor, they shall be deemed to be, and shall be registered as, associated trade marks.

(3) Any association of a trade mark with any other trade mark registered in the name of the same proprietor shall be deemed to be an association with all trade marks associated with that other trade mark.

[Sub-s. (3) substituted by s. 63 of Act 38 of 1997.]

(4) Trade marks that are registered as, or that are deemed by virtue of this Act to be, associated trade marks shall only be assignable or transmissible together and not separately, but they shall for all other purposes be deemed to have been registered as separate marks.

(5) On application made in the prescribed manner by the registered proprietor of two or more trade marks registered as associated trade marks, the registrar may dissolve the association as regards any of them if he is satisfied that there would be no likelihood of deception or confusion being caused if that trade mark were used by another person in relation to any of the goods or services in respect of which it is registered, and may amend the register accordingly.

31 Use of one associated or substantially identical trade mark equivalent to use of another

(1) When under the provisions of this Act use of a registered trade mark is required to be proved for any purpose, the registrar or the court, as the case may be, may, if and so far as he or it deems fit, accept proof of the use of an associated registered trade mark or of the trade mark with additions or alterations not substantially affecting its identity, as equivalent to proof of the use required to be proved.

(2) The use of the whole of a registered trade mark shall for the purposes of this Act be deemed to be the use also of any registered trade mark being a part thereof and registered in the name of the same proprietor by virtue of subsection (1) of section 18.

32 Limitation of trade mark as to particular colours

(1) A trade mark may be limited in whole or in part to a particular colour or colours, and in case of any application for the registration of a trade mark the fact that the trade mark is so limited shall be taken into consideration in deciding whether it is capable of distinguishing.

(2) If and in so far as a trade mark is registered without limitation of colour, it shall be deemed to be registered for all colours.

PART VIII INFRINGEMENT (ss 33-36)

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.

[Para. (d) substituted by s. 64 (b) of Act 38 of 1997.]

[Sub-s. (3) amended by s. 64 (a) of Act 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 well-known 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 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 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.

PART IX DURATION AND RENEWAL OF REGISTRATION (s 37)

37 Duration and renewal of registration

(1) The registration of a trade mark shall be for a period of 10 years, but may be renewed from time to time in accordance with the provisions of this section.

(2) The registrar shall, on application made by the registered proprietor of a registered trade mark in the prescribed manner and within the prescribed period, renew the registration of the trade mark for a period of 10 years from the date of expiration of the original registration or of the last renewal of registration, as the case may be, which date is in this section referred to as 'the expiration of the last registration': Provided that, in the case of an application made in terms of section 63, the date of the original registration shall, for the purposes of this subsection, be deemed to be the date of lodgement of the application at the trade marks office.

(3) At the prescribed time before the expiration of the last registration of a trade mark, the registrar shall send notice in the prescribed manner to the registered proprietor at his address for service of the date of expiration and the conditions as to payment of fees and otherwise upon which a renewal of registration may be obtained, and, if at the expiration of the time prescribed those conditions have not been duly complied with, the registrar may remove the trade mark from the register subject to such conditions, if any, as to its restoration to the register as may be prescribed.

(4) Where a trade mark has been removed from the register for non-payment of the fee for renewal, it shall, nevertheless, for the purpose of any application for the registration of a trade mark during one year next following the date of the expiration of the last registration, be deemed to be a trade mark that is already on the register: Provided that the foregoing provisions of this subsection shall not have effect where the registrar is satisfied that there has been no *bona fide* use of the trade mark that has been removed during the two years immediately preceding the date of the expiration of the last registration.

PART X **PERMITTED USE AND REGISTERED USERS (s 38)**

38 Permitted use and registered users

(1) Where a registered trade mark is used by a person other than the proprietor thereof with the licence of the proprietor, such use shall be deemed to be permitted use for the purposes of subsection (2).

(2) The permitted use of a trade mark referred to in subsection (1) shall be deemed to be use by the proprietor and shall not be deemed to be use by a person other than the proprietor for the purposes of section 27 or for any other purpose for which such use is material under this Act or at common law.

(3) Subject to the provisions of this section, a person, other than the proprietor of a registered trade mark, who uses such trade mark with the licence of the proprietor, may be registered as a registered user thereof in respect of all or any of the goods or services in respect of which the trade mark is registered.

(4) Subject to any agreement subsisting between the parties, a registered user of a registered trade mark shall be entitled to call upon the proprietor thereof to institute infringement proceedings, and, if the proprietor refuses or neglects to do so within two months after being so called upon, the registered user may institute proceedings, as contemplated in section 34, in his own name as if he were the proprietor, citing the proprietor as a co-defendant, but a proprietor so cited shall not be liable for any costs unless he enters an appearance and takes part in the proceedings.

(5) In all proceedings relating to a registered trade mark, the registration of a person as a registered user shall be *prima facie* evidence that the use of the registered trade mark by him is permitted use as contemplated by subsection (1).

(6) Where it is proposed that a person shall be registered as a registered user of a trade mark, the proprietor shall apply in writing to the registrar in the prescribed manner giving particulars of-

- (a) the name and address of the proposed registered user;
- (b) the relationship, existing or proposed, between the proprietor and the proposed registered user; and
- (c) the goods or services in respect of which the person is to be registered as a registered user of the trade mark.

(7) When the requirements of subsection (6) have been complied with, the registrar shall register the proposed registered user as a registered user in respect of the relevant goods or services.

(8) Without derogating from the provisions of section 24, the registration of a person as a registered user-

- (a) may be cancelled or varied by the registrar on application in writing in the prescribed manner by the registered proprietor or by such registered user or by any other registered user of the trade mark;
- (b) shall be cancelled by the registrar where the trade mark in respect of which such person has been registered has been assigned and application has in terms of section 40 been made for registration of the assignment, unless the subsequent proprietor registered in terms of the said section requests the registrar in the prescribed manner not to cancel any such registration and furnishes the registrar with the particulars referred to in paragraph (b) of subsection (6).

(9) The registrar may at any time cancel the registration of a person as a registered user of a trade mark, in respect of any goods or services in respect of which the trade mark is no longer registered.

(10) The provisions of this section shall also apply to all trade marks registered under the repealed Act.

PART XI **ASSIGNMENT AND HYPOTHECATION (ss 39-41)**

39 Powers of, and restrictions on, assignment and transmission

(1) Subject to any rights appearing from the register, a registered trade mark is assignable and transmissible, either in connection with or without the goodwill of the business concerned in the goods or services in respect of which it has been registered.

(2) A registered trade mark is assignable and transmissible in respect of all or some of the goods or services in respect of which it is registered.

(3) The assignment or transmission of a registered trade mark shall be subject to any deed of security hypothecating it.

(4) If, as a result of the assignment or transmission of a registered trade mark, the use of the trade mark by different persons in the Republic or elsewhere would give rise to the likelihood of deception or confusion, section 10 (13) shall apply.

[Sub-s. (4) substituted by s. 66 **(a)** of Act 38 of 1997.]

(5) Notwithstanding anything to the contrary contained in subsections (1) and (2) and subject to the provisions of subsection (4), where a trade mark which is the subject of a pending application for registration has subsequent to the date of the application been assigned or transmitted, the registrar may, on application in the prescribed manner, and subject to such conditions as he may deem necessary, allow the person entitled to such trade mark by reason of such assignment or transmission, to be substituted as applicant for registration of the trade mark.

(6)

[Sub-s. (6) deleted by s. 66 **(b)** of Act 38 of 1997.]

(7) No assignment of a registered trade mark or a trade mark which is the subject of an application for registration shall be of any force or effect unless it is in writing and signed by or on behalf of the assignor.

40 Registration of assignments and transmissions

(1) Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall make application on the form prescribed to the registrar to register his title, and the registrar shall on receipt of the application and of proof of title to his satisfaction, register him as the proprietor of the trade mark and shall cause particulars of the assignment or transmission to be entered in the register.

(2) Every application to register an assignment or transmission in terms of subsection (1) shall recite the effective date of such assignment or transmission, and if application is made more than 12 months after such date, the applicant shall be liable to pay such penalty as may be prescribed.

41 Hypothecation and attachment

(1) A registered trade mark may be hypothecated by a deed of security.

(2) A registered trade mark may be attached to found or confirm jurisdiction for the purposes of any proceedings before the Transvaal Provincial Division of the Supreme Court of South Africa or the magistrate's court for the district of Pretoria and may be attached and sold in execution pursuant to an order of any such court.

(3) **(a)** Where a deed of security has been lodged with the registrar in the prescribed manner, the registrar shall endorse the register to that effect.

(b) Such endorsement shall record the name and address of the person in whose favour the deed of security has been granted and the nature and duration thereof.

(4) A deed of security in respect of which an endorsement has been made in accordance with the provisions of subsection (3) shall have the effect of a pledge of the trade mark to the person or persons in whose favour the deed of security has been granted.

(5) An assignment or transmission of a registered trade mark in respect of which a deed of security has been endorsed in terms of subsection (3) shall not, without the

written consent of the person in whose favour the deed of security has been granted, be registered by the registrar in terms of section 40.

(6) Where the debt or obligation secured by a deed of security in respect of which the register has been endorsed in terms of subsection (3) has been discharged, any person may apply to the registrar in the prescribed manner for the removal from the register of any endorsement in relation thereto made under subsection (3).

PART XII
CERTIFICATION TRADE MARKS AND COLLECTIVE TRADE MARKS
(ss 42-43)

42 Certification trade marks

(1) A mark capable of distinguishing, in the course of trade, goods or services certified by any person in respect of 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, as the case may be, from goods or services not so certified, shall, on application in the prescribed manner, be registrable as a certification trade mark in respect of such first-mentioned goods or services, in the name, as proprietor thereof, of that person: Provided that a mark may not be so registered in the name of a person who carries on a trade in the goods or services in respect of which registration is sought.

(2) Subject to the provisions of this section, the provisions of this Act shall, except in so far as is otherwise provided, and in so far as they can be applied, apply to a certification trade mark.

43 Collective trade marks

(1) A mark capable of distinguishing, in the course of trade, goods or services of persons who are members of any association from goods or services of persons who are not members thereof, shall, on application in the manner prescribed and subject to the provisions of this section, be registrable as a collective trade mark in respect of such first-mentioned goods or services in the name of such association as the proprietor thereof.

(2) Geographical names or other indications of geographical origin may be registered as collective trade marks.

(3) Subject to the provisions of this section, the provisions of this Act shall, except in so far as is otherwise provided, and in so far as they can be applied, apply to a collective trade mark.

PART XIII
POWERS AND DUTIES OF REGISTRAR (ss 44-48A)

44 Venue of proceedings

Any proceedings before the registrar under this Act shall be heard and disposed of by him at the trade marks office: Provided that if it be made to appear to him by any party that the proceedings may more conveniently or fitly be heard and disposed of in another place, he may hear and dispose of the proceedings in such other place.

45 General powers of registrar

(1) The registrar shall, in connection with any proceedings before him, have all such powers and jurisdiction as are possessed by a single judge in a civil action before the Transvaal Provincial Division of the Supreme Court.

(2) Where no provision is contained in this Act on any matter of procedure, the registrar shall apply the rules governing procedure in the Transvaal Provincial Division of the Supreme Court.

(3) Whenever by this Act any time is specified within which any act is to be performed or thing is to be done by any person, the registrar may, on application by that person and unless otherwise expressly provided, extend the time either before or after its expiration.

(4) Where any party to any proceedings before the registrar neither resides nor carries on business in the Republic, the registrar may order him to give security for the costs of the proceedings and, in default of such security being given, may dismiss the application or opposition, as the case may be.

46 Power of registrar to allow amendment of document

(1) The registrar may at any time before the registration of a trade mark permit the amendment of any document relating to any application or proceedings before him on such terms as to costs or otherwise as he may think just.

(2) If rights in a trade mark which is the subject of a pending application, have been acquired by a body corporate subsequent to the date of application, the registrar may, on good cause shown, permit amendment of the application by the substitution of the name of the body corporate as applicant for registration, notwithstanding that such body corporate was not in existence as at the date of the application.

47 Duty of registrar in exercising discretionary power to give opportunity to applicant of being heard

Whenever any discretionary power is by this Act given to the registrar, he shall not exercise that power adversely to any person without giving that person an opportunity of being heard personally or by his agent.

48 Taxation of costs awarded by registrar

Any costs awarded by the registrar shall be taxed by a taxing officer of the Transvaal Provincial Division of the Supreme Court and payment thereof may be enforced in the same manner as if they were costs allowed by a judge of that division.

48A List of emblems of convention countries and international organizations

(1) The registrar shall keep a list of-

- (a) all state emblems and official signs and hallmarks of convention countries; and
- (b) all emblems, names and abbreviations of names of international organizations,

which are protected in terms of the Paris Convention by virtue of notification to the Republic in accordance with Article **6ter** of the Convention.

(2) The list referred to in subsection (1) shall be open at all convenient times during office hours to inspection by the public.

[S. 48A inserted by s. 67 of Act 38 of 1997.]

PART XIV EVIDENCE (ss 49-52)

49 Register to be *prima facie* evidence

Any register kept under this Act shall be *prima facie* evidence of any matters directed or authorized by this Act to be inserted in that register.

50 Certificate of registrar to be *prima facie* evidence

(1) A certificate purporting to be under the hand of the registrar as to any entry, matter or thing which he is authorized by this Act to make or do, shall be *prima facie* evidence of the entry having been made and of the contents thereof and of the matter or thing having been done or left undone.

(2) Printed or written copies or extracts purporting to be copies of or extracts from any register or book or document relating to trade marks and kept in the trade marks office and certified by the registrar and sealed with the seal of that office, shall be admitted in evidence in all courts and proceedings without further proof or production of the originals.

51 Registration to be *prima facie* evidence of validity

In all legal proceedings relating to a registered trade mark (including applications under section 24) the fact that a person is registered as the proprietor of the trade mark shall be *prima facie* evidence of the validity of the original registration of the trade mark and of all subsequent assignments and transmissions thereof.

[S. 51 substituted by s. 68 of Act 38 of 1997.]

52 Certification of validity

(1) If in any proceedings the validity of any registration of a trade mark is in issue, the court finding that registration to be valid, may certify to that effect.

(2) If in any subsequent proceedings the validity of that registration is unsuccessfully attacked by any party, that party shall, unless the court otherwise directs, pay to the other party his full costs, charges and expenses as between agent or attorney and client so far as that registration is concerned.

PART XV APPEALS TO AND POWERS OF COURT (ss 53-59)

53 Recourse to court, and appeals

(1) Without derogating from the provisions of subsection (2), any person aggrieved by any decision or order of the registrar may, within a period of three months after the date of any such decision or order, apply to the Transvaal Provincial Division of the Supreme Court for relief, and the said court shall have the power to consider the merits of any such matter, to receive further evidence, and to make any order as it may deem fit.

(2) Any party to any opposed proceedings before the registrar may appeal to the Transvaal Provincial Division of the Supreme Court against any decision or order pursuant to such proceedings.

(3) In addition to any other powers conferred upon it by this Act, the Transvaal Provincial Division of the Supreme Court may in relation to such appeal-

- (a) confirm, vary or reverse the order or decision appealed against, as justice may require;
- (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the registrar with instructions in regard to the taking of further evidence or the setting out of further information;
- (c) order the parties or either of them to produce at some convenient time in the said court such further proof as shall to it seem necessary or desirable; or
- (d) take any other course which may lead to the just, speedy and as far as may be possible inexpensive settlement of the case; and
- (e) make such order as to costs as justice may require.

(4) Every appeal to the Transvaal Provincial Division of the Supreme Court from a decision or order of the registrar shall be noted and prosecuted in the manner prescribed by law for appeals to that division against a civil order or decision of a single judge of that division, save that-

- (a) no leave to appeal to the said division shall be necessary;
- (b) the period within which such appeal shall be noted shall be three months after the date of the decision or order;
- (c) the appeal shall be prosecuted within six weeks from the date upon which it was noted:

Provided that the said division may, on application and on good cause shown, allow such extension of time for noting or prosecuting the appeal as it may deem necessary.

(5) The parties to proceedings before the registrar shall be deemed to be parties to civil proceedings for the purposes of the Supreme Court Act, 1959 (Act 59 of 1959).

(6) Every appeal to the Appellate Division of the Supreme Court by virtue of subsection (5) shall be governed by the Supreme Court Act, 1959, and shall be noted and prosecuted in the manner prescribed by law for appeals to the said division in civil proceedings.

54 Power to order production of certificate of registration

In addition to any other powers conferred upon it by this Act, the court may in relation to any application or appeal under this Act order any party to deliver to the court or to the registrar the certificate of registration of any trade mark.

55 Notice to registrar of application to court

Before any application is made to the court for an order involving the performance of any act by the registrar or affecting any entry in the register, the applicant shall in the manner prescribed give the registrar at least 14 days' notice before the hearing of

such application: Provided that the registrar may, in his discretion, waive such notice or accept such shorter notice as he may in the circumstances deem sufficient.

56 Registrar's appearance in proceedings involving rectification of register

(1) In any legal proceeding in which the relief sought includes alteration or rectification of the register, the registrar shall have the right to appear and be heard, and shall appear if so directed by the court.

(2) Unless otherwise directed by the court, the registrar, in lieu of appearing and being heard, may submit to the court a statement in writing signed by him, giving particulars of the proceedings before him in relation to the matters in issue or of the grounds of any decision given by him affecting such matters or of the practice of the trade marks office in like cases or of such other matters relevant to the issues and within his knowledge as registrar, as he thinks fit, and the statement shall be deemed to form part of the evidence in the proceedings.

57 Court's power to review registrar's decision

The Transvaal Provincial Division of the Supreme Court shall have power to review any decision or ruling of the registrar made under this Act.

58 Discretion of court in appeals

In any appeal to the court under this Act against a decision of the registrar, the court shall have power to exercise the same discretionary powers as under this Act are conferred upon the registrar.

59 Procedure in cases of option to apply to court or registrar

(1) Where under any provision of this Act an applicant has an option to make an application either to the court or to the registrar-

- (a) if proceedings concerning the trade mark in question are pending before the court, the application must be made to the court;
- (b) if in any other case the application is made to the registrar, he may, at any stage of the proceedings, refer the application to the court, or he may, after hearing the parties, determine the question between them.

(2) Where proceedings in terms of section 21, 24, 26, 27 or 38 (8) are pending before the registrar, the registrar may in his discretion refer the proceedings to the court, and shall refer the proceedings to the court on written application of all the parties to such proceedings.

PART XVI OFFENCES (ss 60-62)

60 Penalties for fraud in relation to registers

Any person who-

- (a) makes or causes to be made a false entry in any register kept under this Act;
- (b) makes or causes to be made a writing falsely purporting to be a copy of an entry in any such register; or

- (c) produces or tenders or causes to be produced or tendered as evidence any such entry or copy thereof knowing it to be false,

shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding 12 months.

61 Penalty for making false statements for purpose of deceiving or influencing registrar or other officer

Any person who-

- (a) for the purpose of deceiving the registrar or any officer in the execution of the provisions of this Act; or
- (b) for the purpose of procuring or influencing the doing or omission of anything in relation to this Act or any matter thereunder,

makes a false statement or representation knowing it to be false, shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding 12 months.

62 Penalty for falsely representing trade mark as registered

(1) Any person who makes a representation-

- (a) with respect to a mark not being a registered trade mark, to the effect that it is a registered trade mark;
- (b) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is so registered;
- (c) to the effect that a registered trade mark is registered in respect of any goods or services in respect of which it is not registered; or
- (d) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered in the register, the registration does not give that right,

shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding 12 months.

(2) For the purposes of this section, the use in the Republic in relation to a trade mark of the word 'registered' or of any abbreviation thereof or of any other word or letter which might reasonably be construed as referring to registration, including the symbol R, shall be deemed to import a reference to registration in the register except-

- (a) where that word, abbreviation, letter or symbol is used in physical association with other words delineated in characters at least as large as those in which that word, abbreviation, letter or symbol is delineated and indicating that the reference is to registration as a trade mark under the laws of a country outside the Republic being a country under the laws of which the registration referred to is in fact in force;
- (b) where that word (being a word other than the word 'registered'), abbreviation, letter or symbol is of itself such as to indicate that the reference is to such registration as is referred to in paragraph (a); or
- (c) where the word, abbreviation, letter or symbol is used in relation to a mark registered as a trade mark under the laws of a country outside the Republic and in relation to goods to be exported to that country.

PART XVII
INTERNATIONAL ARRANGEMENTS (s 63)

63 International arrangements

(1) The State President may, with a view to the fulfilment of a treaty, convention, arrangement or engagement, by proclamation in the **Gazette** declare that any country or group of countries specified in the proclamation is a convention country or are convention countries for the purposes of all or any of the provisions of this Act.

(2) For the purposes of subsection (1) every territory for whose international relations another country is responsible shall be deemed to be a country in respect of which a declaration may be made under that subsection.

(3) Any person who has applied for registration of a trade mark in a convention country, or his legal representative or assignee, shall, in priority to other applicants, be entitled to registration of the trade mark under this Act, and the registration shall have the same date as the date of the first application in the convention country: Provided that-

- (a) application is made within six months after the date on which the application was made in the convention country; and
- (b) nothing in this section contained shall entitle the proprietor of the trade mark to recover damages for infringements happening prior to the actual date on which the application was first advertised in the prescribed manner.

(4) Where applications have been made for the registration of a trade mark in two or more convention countries, the period of six months referred to in subsection (1) shall be reckoned from the date on which the earliest of those applications was made.

(5) Where a person has applied for protection for a trade mark by an application which-

- (a) in accordance with the terms of a treaty subsisting between any two or more convention countries, is equivalent to an application duly made in any one of those convention countries; or
- (b) in accordance with the law of any convention country, is equivalent to an application duly made in that convention country,

he shall be deemed for the purposes of this section to have applied in any of those convention countries or in that convention country.

(6) The registration of a trade mark shall not be invalidated by reason only of the use of the trade mark in the Republic during the period specified in this section as that within which application may be made.

(7) The application for the registration of a trade mark under this section shall be made in the same manner as an ordinary application under this Act, except that proof of application in a convention country shall be established in the manner prescribed.

(8) A right to priority as contemplated in subsection (3) may be assigned or otherwise transmitted.

PART XVIII
MISCELLANEOUS (ss 64-72)

64 Use of trade mark for export trade

The application of a trade mark in the Republic to goods to be exported from the Republic and any other act performed in the Republic in relation to goods to be so exported which, if performed in relation to goods to be sold or otherwise traded in within the Republic, would constitute use of a trade mark therein, shall be deemed to constitute use of the trade mark in relation to those goods for any purpose for which such use is material under this Act or at common law.

65 Payment of prescribed fee to be made before acts performed or documents issued

Whenever under this Act any prescribed fee is payable in respect of any application, registration, matter or document, the registrar may refuse to perform the act or to receive or to issue the document, as the case may be, until the fee payable in respect thereof is paid.

66 Address for service

(1) With every application or notice of opposition under this Act, the applicant or objector, as the case may be, shall furnish a comprehensive address (not being a post box or private bag number) within the Republic as an address for service, which shall, for all purposes of the application or the notice of opposition, be deemed to be the address of the applicant or of the objector, as the case may be, and all documents in relation to the application or notice of opposition may be served by leaving them at or sending them to the address for service of the applicant or of the objector, as the case may be.

(2) The address for service furnished by an applicant in terms of this section shall be deemed to be the *domicilium citandi et executandi* of such applicant for the purposes of proceedings relating to any entry made in the register in pursuance of the application.

(3) Any address for service may be changed by notice to the registrar on the form prescribed.

67 Calculation of periods of time

(1) Any period of time specified by this Act as running from the performance of any act shall be reckoned as commencing on the day next following the performance of that act.

(2) Whenever the last day on which, in terms of this Act, any act may or is required to be performed or any document may or is required to be lodged, falls on a day on which the trade marks office is closed, that act may be performed or that document may be lodged on the next following day on which the trade marks office is open for the transaction of business.

68 Persons under disability

If any person is, by reason of minority, lunacy or other disability, incapable of making any declaration or performing any act required or permitted by this Act, then the guardian, curator or other legal representative (if any) of such person or, if there be none, any person appointed by the court upon application on behalf of the person

under disability or on behalf of any other person interested in the making of such declaration or performing such act may make the declaration or a declaration as nearly corresponding thereto as circumstances permit, and perform the act in the name and on behalf of the person under disability, and all acts performed by such substitute shall, for the purposes of this Act, be as effectual as if performed by the person for whom he is substituted.

69 Fees, regulations, forms and classification of goods

(1) The Minister may prescribe a tariff of the fee which shall be payable to the registrar in respect of any application, registration, matter or document, and the fee shall be payable as so prescribed.

(2) The Minister may also make regulations, not inconsistent with this Act, as to all matters, including forms and a schedule of classification of goods or services, which by this Act are required or permitted to be prescribed or which are necessary or convenient for giving effect to the provisions of this Act or for the conduct of any business relating to the trade marks office established by this Act.

(3) If Parliament resolves within 30 days after any such tariff or regulation has been laid on the Table thereof in accordance with law, that any item of the tariff or that the regulation be disallowed, such item or regulation shall thereupon become of no effect, without prejudice to the validity of anything done in the meanwhile thereunder or to the power to make a new tariff or regulation.

70 Transitional provisions

(1) Subject to the provisions of section 3, and except as expressly otherwise provided in this Act, the validity of the original entry of a trade mark on the register of trade marks existing at the commencement of this Act shall be determined in accordance with the laws in force at the date of such entry.

(2) A trade mark which has been validly registered in terms of the provisions of section 53 of the repealed Act shall, from the date of commencement of this Act, be deemed to be a trade mark registered in terms of this Act, but shall not be removed from the register in terms of the provisions of paragraph (4) of section 10 or of section 27 within a period of 10 years from the date of commencement of this Act.

71 Repeal of laws

The following laws are hereby repealed:

(1) The Trade Marks Act, 1963 (Act 62 of 1963);

(2) the Trade Marks Amendment Act, 1971 (Act 46 of 1971);

(3) the Trade Marks Amendment Act, 1979 (Act 37 of 1979);

(4) the expression '62 of 1963', and the words and expressions opposite thereto, appearing in the First Schedule to the Transfer of Powers and Duties of the State President Act, 1986 (Act 97 of 1986); and

(5) the Trade Marks Amendment Act, 1991 (Act 65 of 1991).

72 Short title and commencement

This Act shall be called the Trade Marks Act, 1993, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

COPYRIGHT ACT 98 OF 1978

[ASSENTED TO 20 JUNE 1978]

[DATE OF COMMENCEMENT: 1 JANUARY 1979]
(Unless otherwise indicated)

(Afrikaans text signed by the State President)

as amended by

Copyright Amendment Act 56 of 1980
Copyright Amendment Act 66 of 1983
Copyright Amendment Act 52 of 1984
Copyright Amendment Act 39 of 1986
Copyright Amendment Act 13 of 1988
Copyright Amendment Act 61 of 1989
Copyright Amendment Act 125 of 1992
Intellectual Property Laws Amendment Act 38 of 1997
Copyright Amendment Act 9 of 2002
Companies Act 71 of 2008

Regulations under this Act

ACT

To regulate copyright and to provide for matters incidental thereto.

ARRANGEMENT OF SECTIONS

Sections

1	Definitions
	CHAPTER 1
2-22	Copyright in original works
	CHAPTER 2
23-28	Infringements of copyright and remedies
	CHAPTER 3
29-36	Copyright Tribunal
	CHAPTER 4
37-38	Extension or restriction of operation of Act
	CHAPTER 5
39-47	Miscellaneous provisions

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.]

'arbitration' means arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act 42 of 1965);

'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.]

'broadcast', when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which-

(a) takes place by means of electromagnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and

(b) is intended for reception by the public or sections of the public,

and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;

[Definition of 'broadcast' substituted by s. 1 (e) of Act 125 of 1992 and by s. 50 (a) of Act 38 of 1997.]

'broadcaster' means a person who undertakes a broadcast;

[Definition of 'broadcaster' substituted by s. 50 (b) of Act 38 of 1997.]

'building' includes any structure;

'cinematograph film' means any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program;

[Definition of 'cinematograph film' substituted by s. 1 (f) of Act 125 of 1992 and by s. 50 (c) of Act 38 of 1997.]

'collecting society' means a collecting society established under this Act;

[Definition of 'collecting society' inserted by s. 1 (a) of Act 9 of 2002.]

'computer program' means a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result;

[Definition of 'computer program' inserted by s. 1 (g) 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;

'Corporation'

[Definition of 'Corporation' deleted by s. 50 (d) of Act 38 of 1997.]

'country' includes any colony, protectorate or territory subject to the authority or under the suzerainty of any other country, and any territory over which trusteeship is exercised;

'derived signal' is a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations;

'diffusion service' means a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public; and diffusion shall not be deemed to constitute a performance or a broadcast or as causing sounds, images, signs or signals to be seen or heard; and where sounds, images, signs or signals are displayed or emitted by any receiving apparatus to which they are conveyed by diffusion in such manner as to constitute a performance or a causing of sounds, images, signs or signals to be seen or heard in public, this shall be deemed to be effected by the operation of the receiving apparatus;

'distribution', in relation to a programme-carrying signal, means any operation by which a distributor transmits a derived signal to the general public or any section thereof;

[Definition of 'distribution' substituted by s. 1 (i) of Act 125 of 1992.]

'distributor', in relation to a programme-carrying signal, means the person who decides that the transmission of the derived signal to the general public or any section thereof shall take place;

[Definition of 'distributor' substituted by s. 1 (j) of Act 125 of 1992.]

'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.]

'emitted signal' means a signal which goes to a satellite;

[Definition of 'emitted signal' substituted by s. 1 (k) of Act 125 of 1992.]

'engraving' includes any etching, lithograph, woodcut, print or similar work, but does not include a photograph;

'exclusive licence' means a licence authorizing a licensee, to the exclusion of all other persons, including the grantor of the licence, to exercise a right which by virtue of this Act would, apart from the licence, be exercisable exclusively by the owner of the copyright; and 'exclusive licensee' shall be construed accordingly;

'infringing copy', in relation to-

- (a) a literary, musical or artistic work or a published edition, means a copy thereof;
- (b) a sound recording, means a record embodying that recording;
- (c) a cinematograph film, means a copy of the film or a still photograph made therefrom;

(d) a broadcast, means a cinematograph film of it or a copy of a cinematograph film of it or a sound recording of it or a record embodying a sound recording of it or a still photograph made therefrom; and

(e) a computer program, means a copy of such computer program, being in any such case an article the making of which constituted an infringement of the copyright in the work, recording, cinematograph film, broadcast or computer program or, in the case of an imported article, would have constituted an infringement of that copyright if the article had been made in the Republic;

[Definition of 'infringing copy' amended by s. 1 (b) of Act 52 of 1984 and substituted by s. 1 (l) of Act 125 of 1992.]

'judicial proceedings' means proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath;

'licence'

[Definition of 'licence' deleted by s. 1 (m) of Act 125 of 1992.]

'licence scheme', for the purposes of Chapter 3, in relation to licences of any description, means a scheme prepared by one or more licensing bodies, setting out the classes of cases in which they are willing, or the person on whose behalf they act is willing, to grant licences of that description, and the charges, if any, and terms and conditions subject to which licences may be granted in those classes of cases, and includes anything in the nature of such a scheme, whether described as a scheme or as a tariff or by any other name;

[Definition of 'licence scheme' substituted by s. 1 (n) of Act 125 of 1992.]

'licensing body'

[Definition of 'licensing body' deleted by s. 1 (o) of Act 125 of 1992.]

'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.]

'Minister' means the Minister of Trade and Industry;

[Definition of 'Minister' substituted by s. 1 (c) of Act 66 of 1983, by s. 1 of Act 13 of 1988 and by s. 1 (b) of Act 9 of 2002.]

'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;

'plate' includes any stereotype, stone, block, mould, matrix, transfer, negative, record, disc, storage medium or any version of a work of whatsoever nature used to make copies;

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

'prescribed' means prescribed by or under this Act;

'programme', in relation to a programme-carrying signal, means a body of live or recorded material consisting of images or sounds or both, embodied in a signal;

[Definition of 'programme' substituted by s. 1 (t) of Act 125 of 1992.]

'programme-carrying signal' means a signal embodying a program which is emitted and passes through a satellite;

[Definition of 'programme-carrying signal' inserted by s. 1 (u) of Act 125 of 1992.]

'prospective owner', in relation to copyright, means a person who shall be entitled to the copyright, wholly or partially, in a work in which copyright does not yet subsist or whose entitlement to the copyright which does exist shall become effective upon a future event;

'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);

'rebroadcasting' means the simultaneous or subsequent broadcasting by one broadcaster of the broadcast of another broadcaster;

[Definition of 'rebroadcasting' substituted by s. 50 (f) of Act 38 of 1997.]

'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.]

'Registrar' means the Commissioner appointed in terms of section 189 of the Companies Act, 2008;

[Definition of 'Registrar' substituted by s. 224 (2) of Act 71 of 2008.]

'regulation' means a regulation made under this Act;

'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;

'satellite' means any device in extra-terrestrial space capable of transmitting signals;

'signal' means an electronically generated carrier capable of transmitting programmes;

'sculpture' includes any cast or model made for purposes of sculpture;

'sound recording' means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film;

[Definition of 'sound recording' substituted by s. 1 (v) of Act 125 of 1992 and by s. 50 (h) of Act 38 of 1997.]

'this Act' includes the regulations;

'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;
- (e) sound recordings;
- (f) broadcasts;
- (g) programme-carrying signals;
- (h) published editions;
- (i) computer programs.

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

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

[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.]

8 Nature of copyright in cinematograph films

(1) Copyright in a cinematograph film vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the film in any manner or form, including making a still photograph therefrom;

[Para. (a) substituted by s. 8 (a) of Act 125 of 1992.]

- (b) causing the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;

- (c) broadcasting the film;

- (d) causing the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster;

[Para. (d) substituted by s. 5 (b) of Act 56 of 1980.]

- (e) making an adaptation of the film;

- (f) doing, in relation to an adaptation of the film, any of the acts specified in relation to the film in paragraphs (a) to (d) inclusive;

- (g) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the film.

[Para. (g) added by s. 6 of Act 52 of 1984 and substituted by s. 1 of Act 61 of 1989 and by s. 8 (b) of Act 125 of 1992.]

[Sub-s. (1) amended by s. 5 (a) of Act 56 of 1980.]

(2)

[Sub-s. (2) deleted by s. 8 (c) of Act 125 of 1992.]

9 Nature of copyright in sound recordings

Copyright in a sound recording vests the exclusive right to do so or to authorize the doing of any of the following acts in the Republic:

- (a) Making, directly or indirectly, a record embodying the sound recording;
- (b) letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording;
- (c) broadcasting the sound recording;

(d) causing the sound recording to be transmitted in a diffusion service, unless that service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster;

(e) communicating the sound recording to the public.

[S. 9 substituted by s. 6 of Act 56 of 1980, amended by s. 7 of Act 52 of 1984 and substituted by s. 2 of Act 9 of 2002.]

9A Royalties

(1) (a) In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9 (c), (d) or (e) without payment of a royalty to the owner of the relevant copyright.

(b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.

(c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may refer the matter to the Copyright Tribunal referred to in section 29 (1) or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act 42 of 1965).

(2) (a) The owner of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act 11 of 1967).

(b) The performer's share of the royalty shall be determined by an agreement between the performer and the owner of copyright, or between their representative collecting societies.

(c) In the absence of an agreement contemplated in paragraph (b), the performer or owner may refer the matter to the Copyright Tribunal referred to in section 29 (1), or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act 42 of 1965).

(d) Any payment made by the user of the sound recording in terms of this subsection shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers' Protection Act, 1967 (Act 11 of 1967).

(3) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.

[S. 9A inserted by s. 3 of Act 9 of 2002.]

10 Nature of copyright in broadcasts

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

- (a) Reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph therefrom;

[Para. (a) substituted by s. 9 of Act 125 of 1992.]

- (b) rebroadcasting the broadcast;
- (c) causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.

[S. 10 amended by s. 7 of Act 56 of 1980.]

11 Nature of copyright in programme-carrying signals

Copyright in programme-carrying signals vest the exclusive right to undertake, or to authorize, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.

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.]

11B Nature of copyright in computer programs

Copyright in a computer program vests the exclusive right to do or authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the computer program in any manner or form;
- (b) publishing the computer program if it was hitherto unpublished;
- (c) performing the computer program in public;
- (d) broadcasting the computer program;
- (e) causing the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster;
- (f) making an adaptation of the computer program;
- (g) doing, in relation to an adaptation of the computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (e) inclusive;
- (h) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program.

[S. 11B inserted by s. 10 of Act 125 of 1992 and substituted by s. 53 of Act 38 of 1997.]

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 informative 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.]

13 General exceptions in respect of reproduction of works

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

[S. 13 substituted by s. 8 of Act 56 of 1980.]

14 Special exception in respect of records of musical works

(1) The copyright in a musical work shall not be infringed by a person (in this section referred to as the 'manufacturer') who makes a record of the work or of an adaptation thereof in the Republic, whether from an imported disc, tape, matrix or otherwise, if-

- (a) records embodying the work or a similar adaptation of the work were previously made in or imported into the Republic for the purposes of retail sale and were so made or imported by, or with the licence of, the owner of the copyright in the work;
- (b) before making the record the manufacturer gave the prescribed notice to the owner of the copyright of his intention to make it;
- (c) the manufacturer intends to sell the record by retail or to supply it for the purpose of resale by retail by another person or to use it for making other records to be so sold or so supplied; and
- (d) in the case of a record which is sold by retail or supplied for the purpose of resale by retail, the manufacturer pays to the owner of the copyright, in the prescribed manner and at the prescribed time, the prescribed royalties.

(2) Where a record comprises, with or without other material, a performance of a musical work or of an adaptation of a musical work in which words are sung or are spoken that are incidental to, or in association with, the music and no copyright

subsists in that work or, if copyright does subsist therein, the conditions specified in subsection (1) are fulfilled in relation to such copyright and-

- (a) the words consist or form part of a literary work in which copyright subsists; and
- (b) the records referred to in subsection (1) (a) were made or imported by or with the licence of the owner of the copyright in that literary work; and
- (c) the conditions specified in subsection (1) (b) and (d) are fulfilled in relation to the owner of that copyright,

the making of the record shall not constitute an infringement of the copyright in the literary work.

(3) For the purposes of this section an adaptation of a work shall be deemed to be similar to an adaptation thereof embodied in a previous record if the two adaptations do not substantially differ in their treatment of the work, either in respect of style or, apart from any difference in number, in respect of the performers required to perform them.

(4) A manufacturer may for the purposes of paragraph (a) of subsection (1) make the prescribed enquiries in order to ascertain whether the previous records referred to in that paragraph were previously made in or imported into the Republic, and if the owner of the copyright fails to reply to such enquiries within the prescribed period, the said previous records shall be taken to have been made or imported, as the case may be, with the licence of the owner of the copyright.

(5) The preceding provisions of this section shall apply also with reference to records of a part of a work or an adaptation thereof: Provided that the provisions of subsection (1) shall not apply with reference to-

- (a) a record of the whole of a work or an adaptation thereof unless the previous records referred to in paragraph (a) of that subsection were records of the whole of the work or of a similar adaptation; or
- (b) a record of a part of a work or an adaptation thereof unless the records previously made in or imported into the Republic as contemplated in paragraph (a) of that subsection were of, or included, that part of the work or of a similar adaptation.

[S. 14 substituted by s. 12 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.]

16 General exceptions regarding protection of cinematograph films

(1) The provisions of section 12 (1) **(b)** and **(c)**, (2), (3), (4), (12) and (13) shall *mutatis mutandis* apply with reference to cinematograph films.

(2) Where sounds embodied in a sound-track associated with a cinematograph film are also embodied in a record other than such a sound-track or in a record derived directly or indirectly from such a sound-track, the copyright in the film shall not be infringed by the use of that record.

[S. 16 substituted by s. 14 of Act 125 of 1992.]

17 General exceptions regarding protection of sound recordings

The provisions of section 12 (1) **(b)** and **(c)**, (2), (3), (4), (5), (12) and (13) shall *mutatis mutandis* apply with reference to sound recordings.

[S. 17 substituted by s. 15 of Act 125 of 1992.]

18 General exceptions regarding protection of broadcasts

The provisions of section 12 (1) to (5) inclusive, (12) and (13) shall *mutatis mutandis* apply with reference to broadcasts.

[S. 18 substituted by s. 16 of Act 125 of 1992.]

19 General exceptions from protection of programme-carrying signals

(1) The copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried-

(a) that consist of reports of current events; or

(b) as are compatible with fair practice,

and to the extent justified by the informatory purpose of such excerpts.

(2) The provisions of this section shall not apply with reference to a programme carried by programme-carrying signals representing a sporting event.

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.]

19B General exceptions regarding protection of computer programs

(1) Subject to the provisions of section 23 (2) *(d)*, the provisions of section 12 (1) *(b)* and *(c)*, (2), (3), (4), (5), (12) and (13) shall *mutatis mutandis* apply, in so far as they can be applied, with reference to computer programs.

(2) The copyright in a computer program shall not be infringed by a person who is in lawful possession of that computer program, or an authorized copy thereof, if-

- (a)* he makes copies thereof to the extent reasonably necessary for back-up purposes;
- (b)* a copy so made is intended exclusively for personal or private purposes; and
- (c)* such copy is destroyed when the possession of the computer program in question, or authorized copy thereof, ceases to be lawful.

[S. 19B inserted by s. 18 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.]

22 Assignment and licences in respect of copyright

(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law.

(2) An assignment or testamentary disposition of copyright may be limited so as to apply to some only of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the term of the copyright, or to a specified country or other geographical area.

(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as the case may be.

(4) A non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.

(5) An assignment, licence or testamentary disposition may be granted or made in respect of the copyright in a future work, or the copyright in an existing work in which copyright does not subsist but will come into being in the future, and the future copyright in any such work shall be transmissible as movable property.

(6) A testamentary disposition of the material on which a work is first written or otherwise recorded shall, in the absence of a stipulation to the contrary, be taken to include the disposition of any copyright or future copyright in the work which is vested in the deceased at the time of his death.

(7) A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright, shall be binding

upon every successor in title to his interest in the copyright, except a purchaser in good faith and without notice, actual or constructive, of the licence or a person deriving title from such a purchaser, and any reference in this Act to the doing in relation to any copyright of anything with or without the licence of the owner of the copyright shall be construed accordingly.

(8) Where the doing of anything is authorized by the grantee of a licence or a person deriving title from the grantee, and it is within the terms, including any implied terms, of the licence for him to authorize it, it shall for the purpose of this Act be deemed to be done with the licence of the grantor and of every person, if any, upon whom the licence is binding.

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.]

(1A) 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 in respect of the work or type of work concerned.

[Sub-s. (1A) inserted by s. 21 **(b)** of Act 125 of 1992 and substituted by s. 55 of Act 38 of 1997.]

(1B) For the purposes of determining the amount of damages or a reasonable royalty to be awarded under this section or section 25 (2), the court may direct an enquiry to be held and may prescribe such procedures for conducting such enquiry as the court considers necessary.

[Sub-s. (1B) inserted by s. 21 **(b)** of Act 125 of 1992 and substituted by s. 55 of Act 38 of 1997.]

(1C) Before the owner of copyright institutes proceedings under this section, he or she shall give notice in writing to the exclusive licensee or sub-licensee of the copyright concerned of the intention to do so, and the exclusive licensee or sub-licensee may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled.

[Sub-s. (1C) inserted by s. 21 **(b)** of Act 125 of 1992 and substituted by s. 55 of Act 38 of 1997.]

(2) Where in an action for infringement of copyright it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement.

[Sub-s. (2) substituted by s. 21 **(c)** of Act 125 of 1992.]

(3) Where in an action under this section an infringement of copyright is proved or admitted, and the court having regard, in addition to all other material considerations, to-

- (a)** the flagrancy of the infringement; and
- (b)** any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the plaintiff, the court shall in assessing damages for the infringement have power to award such additional damages as the court may deem fit.

(4) In an action for infringement of copyright in respect of the construction of a building, no interdict or other order shall be made-

- (a)** after the construction of the building has been begun so as to prevent it from being completed; or

- (b) so as to require the building, in so far as it has been constructed, to be demolished.

25 Rights of action and remedies of exclusive licensee and exclusive sub-licensee

(1) An exclusive licensee and an exclusive sub-licensee shall have the same rights of action and be entitled to the same remedies as if the licence were an assignment, and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under which the licence and sub-licence were granted.

(2) Before an exclusive licensee or sub-licensee institutes proceedings under subsection (1), he or she shall give notice in writing to the owner of the copyright concerned of the intention to do so, and the owner may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled.

[Sub-s. (2) added by s. 22 of Act 125 of 1992 and substituted by s. 56 of Act 38 of 1997.]

[S. 25 substituted by s. 1 of Act 39 of 1986.]

26 Onus of proof in proceedings

(1) Where in the case of a literary, musical or artistic work or a computer program a name purporting to be that of the author appeared on copies of the said work or program as published or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appeared shall, if it was his true name or a name by which he was commonly known, in any proceedings brought by virtue of this Chapter be presumed, unless the contrary is proved, to be the author of the work or program.

(2) In the case of a work or program alleged to be a work or program of joint authorship, subsection (1) shall apply in relation to each person alleged to be one of the authors of the work or program as if references in that subsection to the author were references to one of the authors.

(3) Where in any proceedings brought by virtue of this Chapter with respect to a literary, musical or artistic work or a computer program which is anonymous or pseudonymous it is established-

- (a) that the work or program was first published in the Republic and was so published within the period of fifty years ending with the beginning of the calendar year in which the proceedings were brought; and
- (b) that a name purporting to be that of the publisher appeared on copies of the work or program as first published,

then, unless the contrary is shown, copyright shall be presumed to subsist in the work or program and the person whose name so appeared shall be presumed to have been the owner of that copyright at the time of the publication: Provided that this subsection shall not apply if the actual name of the author of a pseudonymous work is commonly known.

(4) Where in any proceedings brought by virtue of this Chapter with respect to a literary, musical or artistic work or a computer program it is proved or admitted that the author of the work or program is dead, the work or program shall be presumed to be an original work or program unless the contrary is proved.

(5) Subsection (4) shall also apply where a work or program has been published and-

- (a) the publication was anonymous or under a name alleged by the plaintiff or the State to be a pseudonym; and
- (b) it is not shown that the work or program has ever been published under the true name of the author or under a name by which he was commonly known or that it is possible for a person without previous knowledge of the facts to ascertain the identity of the author by reasonable inquiry.

(6) Where in any proceedings brought by virtue of this Chapter with respect to the alleged infringement of copyright in a cinematograph film it is proved that the name purporting to be the name of the author of that film appears thereon in the prescribed manner, the person whose name so appears shall be presumed to be the author of that film, unless the contrary is proved.

(7) Where in any proceedings brought by virtue of this Chapter with respect to the alleged infringement of copyright in a sound recording it is proved that records embodying that recording or part thereof have been issued to the public and that at the time when those records were so issued the following claims appeared on a label or any other printed matter affixed to such records or in or on anything in which they were contained, that is to say-

- (a) that a person named on the label or printed matter is the author of the sound recording; or
- (b) that the recording was first published in a year and at a place specified on the label or printed matter,

that label or printed matter shall be sufficient evidence of the facts so stated, except in so far as the contrary is proved.

(7A) A claim contemplated in paragraph (a) of subsection (7) may be made by means of the symbol 'C' in conjunction with the name of the person concerned, and a claim contemplated in paragraph (b) of that subsection may be made by means of the symbol 'P' in conjunction with the year and place in question.

(8)

(9) In any proceedings by virtue of this Chapter with regard to the alleged infringement of the copyright in a cinematograph film registered in terms of the Registration of Copyright in Cinematograph Films Act, 1977 (Act 62 of 1977), it shall be presumed-

- (a) that every party to those proceedings had knowledge of the particulars entered in the register of copyright mentioned in section 15 of the said Act from the date of the lodging of the application in question to record those particulars;
- (b) that the person who is alleged to have done an act which infringes the relevant copyright did that act without the required authority, unless the contrary is proved.

(10) In any proceedings by virtue of this Chapter with regard to the alleged infringement of the copyright in a cinematograph film, a sound recording or a computer program, it shall be presumed, until the contrary is proved, that any person trading in the selling, letting or distribution of copies of any of the said works, and who

was found in possession of a copy of any of such works, sold or let for hire or by way of trade offered or exposed for sale or hire such copy.

(11) Where in any proceedings by virtue of this Chapter with regard to the alleged infringement of the copyright in a work it is proved that the person alleged to have done an act which allegedly infringes the relevant copyright did such act without the authority of the exclusive licensee, it shall be presumed, unless the contrary is proved, that the relevant act was done also without the authority of the owner of the copyright concerned.

(12) **(a)** In any proceedings by virtue of this Chapter relating to the alleged infringement of the copyright in a work, evidence to prove-

- (i) the subsistence of the copyright in that work; or
- (ii) the title of any person in respect of such copyright, whether by way of ownership or licence,

may be adduced by way of affidavit, and the mere production of such affidavit in such proceedings shall be *prima facie* proof of the relevant facts.

(b) The court before which an affidavit referred to in paragraph **(a)** is produced, may in its discretion order the person who made the affidavit to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and any reply purporting to be a reply from such person, shall likewise be admissible in evidence in such proceedings.

[S. 26 amended by s. 3 of Act 66 of 1983, by s. 10 of Act 52 of 1984 and by s. 3 (1) of Act 13 of 1988 and substituted by s. 23 of Act 125 of 1992.]

27 Penalties and proceedings in respect of dealings which infringe copyright

(1) Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright-

- (a)** makes for sale or hire;
- (b)** sells or lets for hire or by way of trade offers or exposes for sale or hire;
- (c)** by way of trade exhibits in public;
- (d)** imports into the Republic otherwise than for his private or domestic use;
- (e)** distributes for purposes of trade; or
- (f)** distributes for any other purposes to such an extent that the owner of the copyright is prejudicially affected,

articles which he knows to be infringing copies of the work, shall be guilty of an offence.

[Sub-s. (1) substituted by s. 11 **(a)** of Act 52 of 1984 and by s. 3 of Act 61 of 1989.]

(2) Any person who at a time when copyright subsists in a work makes or has in his possession a plate knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence.

(3) Any person who causes a literary or musical work to be performed in public knowing that copyright subsists in the work and that performance constitutes an infringement of the copyright, shall be guilty of an offence.

(4) Any person who causes a broadcast to be rebroadcast or transmitted in a diffusion service knowing that copyright subsists in the broadcast and that such

rebroadcast or transmission constitutes an infringement of the copyright, shall be guilty of an offence.

(5) Any person who causes programme-carrying signals to be distributed by a distributor for whom they were not intended knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright, shall be guilty of an offence.

(6) A person convicted of an offence under this section shall be liable-

(a) in the case of a first conviction, to a fine not exceeding five thousand rand or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, for each article to which the offence relates;

(b) in any other case, to a fine not exceeding ten thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, for each article to which the offence relates.

[Sub-s. (6) substituted by s. 11 (b) of Act 52 of 1984 and by s. 24 (a) of Act 125 of 1992.]

(7)

[Sub-s. (7) deleted by s. 24 (b) of Act 125 of 1992.]

(8)

[Sub-s. (8) added by s. 11 (c) of Act 52 of 1984 and deleted by s. 24 (b) of Act 125 of 1992.]

28 Provision for restricting importation of copies

(1) The owner of the copyright in any published work may give notice in writing to the Commissioner for Customs and Excise (in this section referred to as the 'Commissioner')-

(a) that he is the owner of the copyright in the work; and

(b) that he requests the Commissioner to treat as prohibited goods, during a period specified in the notice, copies of the work to which this section applies:

Provided that the period specified in a notice under this subsection shall not extend beyond the end of the period for which the copyright is to subsist: Provided further that the Commissioner shall not be bound to act in terms of any such notice unless the owner of the copyright furnishes him with security in such form and for such amount as he may require to secure the fulfilment of any liability and the payment of any expense which he may incur by reason of the detention by him of any copy of the work to which the notice relates or as a result of anything done by him in relation to a copy so detained.

[Sub-s. (1) amended by s. 25 (a) of Act 125 of 1992.]

(2) This section shall apply to any copy of the work in question made outside the Republic which if it had been made in the Republic would be an infringing copy of the work.

(3) Where a notice has been given under this section in respect of a work and has not been withdrawn, the importation into the Republic at a time before the end of the period specified in the notice of any copy of the work to which this section applies shall be prohibited.

(4) Notwithstanding anything contained in the Customs and Excise Act, 1964 (Act 91 of 1964), a person shall not be liable to any penalty under that Act (other than forfeiture of the goods) by reason of the fact that any goods are treated as prohibited goods by virtue of this section.

(5) This section shall *mutatis mutandis* apply with reference to an exclusive licensee who has the right to import into the Republic any work published elsewhere.

[Sub-s. (5) substituted by s. 25 (b) of Act 125 of 1992.]

[S. 28 substituted by s. 12 of Act 52 of 1984.]

CHAPTER 3 COPYRIGHT TRIBUNAL (ss 29-36)

29 Establishment of Copyright Tribunal

(1) The judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978, shall also be the Copyright Tribunal (in this Chapter referred to as the tribunal) for the purposes of this Act.

(2) The tribunal may order that the costs or expenses of any proceeding before it incurred by any party shall be paid by any other party, and may tax or settle the amount of any costs or expenses to be paid under any such order or direct in what manner they are to be taxed.

(3) (a) Regulations may be prescribed as to the procedure in connection with the making of references and applications to the tribunal and for regulating proceedings before the tribunal and as to the fees chargeable in respect of those proceedings.

(b) Any such regulations may in relation to proceedings before the tribunal apply any of the provisions of the Arbitration Act, 1965 (Act 42 of 1965), or alternatively, any of the provisions applicable in the court of the Commissioner of Patents in terms of the Patents Act, 1978.

(c) Any regulations may include provision for-

- (i) requiring notice of any intended application to the court under section 36 to be given to the tribunal and to the other parties to the proceedings;
- (ii) suspending or authorizing or requiring the tribunal to suspend the operation of orders of the tribunal in cases where after giving its decision an application under section 36 to any provincial division of the Supreme Court is noted;
- (iii) modifying in relation to orders of the tribunal, of which the operation is suspended, the operation of any provisions of this Chapter as to the effect of orders made thereunder;
- (iv) the publication of notices or the taking of any other steps for ensuring that persons affected by the suspension of an order of the tribunal will be informed of its suspension;
- (v) regulating or prescribing any other matters incidental to or consequential upon any request, application, order or decision under section 36.

[Sub-para. (v) substituted by s. 26 (a) of Act 125 of 1992.]

(4) Without prejudice to any method available by law for the proof of orders of the tribunal, a document purporting to be a copy of any such order and to be certified by

the Registrar to be a true copy thereof shall in any legal proceedings be sufficient evidence of the order unless the contrary is proved.

(5) The Registrar shall act as the registrar of the tribunal.

(6) Any reference in this Chapter to the giving of an opportunity to any person of presenting his case shall be construed as a reference to the giving to that person of the opportunity of submitting representations in writing and of being heard.

[Sub-s. (6) added by s. 26 (b) of Act 125 of 1992.]

30 General provisions as to jurisdiction of tribunal

Subject to the provisions of this Chapter, the function of the tribunal shall be to determine disputes arising between licensing bodies, or other persons from whom licences are required and persons requiring licences, or organizations claiming to be representatives of such persons, either-

- (a) on the reference of a licence scheme to the tribunal; or
- (b) on the application of a person requiring a licence either in accordance with a licence scheme or in a case not covered by a licence scheme.

[S. 30 substituted by s. 27 of Act 125 of 1992.]

31 Reference of licence schemes to tribunal

(1) Where at any time while a licence scheme is in operation a dispute arises with respect to the scheme between the licensing body operating the scheme and-

- (a) an organization claiming to be representative of persons requiring licences in cases of a class to which the scheme applies; or
- (b) any person claiming that he requires a licence in a case of a class to which the scheme applies,

the organization or person in question may refer the scheme to the tribunal in so far as it relates to cases of that class.

(2) The parties to a reference under this section shall be-

- (a) the organization or person at whose instance the reference is made;
- (b) the licensing body operating the scheme to which the reference relates; and
- (c) such other organizations or persons (if any) as apply to the tribunal to be made parties to the reference and are in accordance with subsection (3) made parties thereto.

(3) Where an organization (whether claiming to be representative of persons requiring licences or not) or a person (whether requiring a licence or not) applies to the tribunal to be made a party to a reference, and the tribunal is satisfied that the organization or person has a substantial interest in the matter in dispute, the tribunal may, if it thinks fit make that organization or person a party to the reference.

(4) The tribunal shall not entertain a reference under this section by an organization unless the tribunal is satisfied that the organization is reasonably representative of the class of persons which it claims to represent.

(5) Subject to the provisions of subsection (4), the tribunal shall on any reference under this section consider the matter in dispute and after giving the parties to the reference an opportunity of presenting their respective cases, make such order, either

confirming or varying the scheme in so far as it relates to cases of the class to which the reference relates, as the tribunal may determine to be reasonable in the circumstances.

(6) An order of the tribunal under this section may, notwithstanding anything contained in the licence scheme to which it relates, be made so as to be in force either indefinitely or for such period as the tribunal may determine.

(7) Where the tribunal has made an order in respect of a licence scheme which has been referred to it, such scheme shall, notwithstanding anything contained therein, in so far as it relates to the class of cases in respect of which the order was made, thereafter remain in operation subject to the terms of the order: Provided that this subsection shall not apply in relation to a reference as respects any period after the reference has been withdrawn or has been discharged by virtue of subsection (4).

32 Further reference of scheme to tribunal

(1) Where the tribunal has made an order under section 31 with respect to a licence scheme-

- (a) the licensing body operating the scheme;
- (b) any organization claiming to be representative of persons requiring licences in cases of the class to which the order applies; or
- (c) any person claiming that he requires a licence in a case of that class,

may, subject to the provisions of subsection (2), at any time while the order is in force, again refer the scheme to the tribunal in so far as it relates to cases of the class in respect of which the order applies.

(2) A licence scheme shall not, except with the special leave of the tribunal, again be referred to the tribunal under subsection (1)-

- (a) where the relevant order was made so as to be in force indefinitely or for a period exceeding fifteen months, before the expiration of a period of twelve months from the date on which the order was made; or
- (b) where such order was made so as to be in force for a period not exceeding fifteen months, at any time more than three months before the date of expiry of the order.

(3) The provisions of section 31 shall *mutatis mutandis* apply in respect of any reference under this section or any order made thereon, and the tribunal shall have power to make such order on any such reference as it deems just.

33 Applications to tribunal

(1) For the purposes of this Chapter a case shall be taken to be covered by a licence scheme if, in accordance with a licence scheme for the time being in operation, licences would be granted in cases of the class to which that case belongs: Provided that where in accordance with the provisions of a licence scheme-

- (a) the licences which would be so granted would be subject to terms and conditions whereby particular matters would be excepted from the licences; and
- (b) the case in question relates to one or more matters falling within such an exception,

that case shall be taken not to be covered by the scheme.

(2) Any person who claims that in a case covered by a licence scheme the licensing body operating the scheme has refused or failed to grant him a licence in accordance with the provisions of the scheme or to procure the grant to him of such a licence, may apply to the tribunal for an order under this section.

(3) An application for such an order may also be made by any person who claims that he requires a licence in a case not covered by a licence scheme, and either-

- (a) that a licensing body or person has refused or failed to grant the licence or to procure the grant thereof, and that in the circumstances it is unreasonable that the licence should not be granted; or
- (b) that any charges, terms or conditions subject to which a licensing body proposes that the licence should be granted are unreasonable.

(4) Where an organization (whether claiming to be representative of persons requiring licences or not) or a person (whether requiring a licence or not) applies to the tribunal to be made a party to an application under subsection (2) or (3), and the tribunal is satisfied that the organization or person has a substantial interest in the matter in dispute, the tribunal may if it thinks fit make that organization or person a party to the application.

(5) On any application under subsection (2) or (3) the tribunal shall give the applicant and the licensing body in question and every other party to the application an opportunity of presenting his case, and if the tribunal is satisfied that the claim of the applicant is well-founded, it shall make an order declaring that, in respect of the matters specified in the order, the applicant is entitled to a licence on such terms and conditions and subject to the payment of such charges (if any) as the tribunal may-

- (a) in the case of an application under subsection (2), determine to be applicable in accordance with the licence scheme; or
- (b) in the case of an application under subsection (3), determine to be reasonable in the circumstances.

(6) Any reference in this section to failure to grant or procure the grant of a licence shall be construed as including a reference to a failure to grant it or to procure the grant thereof within a reasonable time after being requested to do so.

34 Diffusion service

In a dispute concerning the transmission of broadcasts in a diffusion service in the Republic, the tribunal shall disallow any claim under this Act to the extent to which the licences of the broadcaster concerned provide for or include such transmission in a diffusion service.

[S. 34 substituted by s. 57 of Act 38 of 1997.]

35 Effect of orders of tribunal, and supplementary provisions relating thereto

(1) Any person who complies with the conditions of an order made by the tribunal under this Chapter or who has given a satisfactory undertaking to the owner or prospective owner of the copyright to comply with such conditions, shall be deemed to be the holder of a licence under this Act.

(2) In the exercise of its jurisdiction in respect of licences relating to television broadcasts, the tribunal shall have regard *inter alia* to any conditions imposed by the promoters of any entertainment or other event which is to be comprised in the broadcasts, and in particular the tribunal shall not hold a refusal or failure to grant a licence to be unreasonable if it could not have been granted consistently with those conditions.

36 Appeals

(1) Any party to proceedings before the tribunal may appeal against any order or decision of the tribunal pursuant to such proceedings.

(2) Every appeal shall be noted and prosecuted in the manner prescribed by law for appeals against a civil order or decision of a single judge, and sections 20 and 21 of the Supreme Court Act, 1959 (Act 59 of 1959), shall apply *mutatis mutandis*.

(3) The court may in respect of any such appeal-

- (a) confirm, vary or set aside the order or decision appealed against, as the court may deem fair;
- (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the tribunal with instructions in regard to the taking of further evidence or the setting out of further information;
- (c) take any other course which in the opinion of the court is fair and may lead to the speedy and as far as may be possible inexpensive settlement of the case; and
- (d) make such order as to costs as the court may deem fair.

[S. 36 substituted by s. 28 of Act 125 of 1992.]

CHAPTER 4 EXTENSION OR RESTRICTION OF OPERATION OF ACT (ss 37-38)

37 Application of Act to countries to which it does not extend

(1) The Minister may by notice in the *Gazette* provide that any provision of this Act specified in the notice shall in the case of any country so specified apply-

- (a) in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings and published editions first published in that country as it applies in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings and published editions first published in the Republic;

[Para. (a) substituted by s. 13 of Act 52 of 1984 and by s. 29 (a) of Act 125 of 1992.]

- (b) in relation to persons who at a material time are citizens or subjects of that country as it applies in relation to persons who at such a time are South African citizens;
- (c) in relation to persons who at a material time are domiciled or resident in that country as it applies in relation to persons who at such a time are domiciled or resident in the Republic;
- (d) in relation to bodies incorporated under the laws of that country as it applies in relation to bodies incorporated under the laws of the Republic;

- (e) in relation to broadcasts made and programme-carrying signals emitted to a satellite from places in that country as it applies in relation to broadcasts made and programme-carrying signals emitted to a satellite from a place in the Republic.

[Para. (e) substituted by s. 29 (b) of Act 125 of 1992.]

(2) A notice under this section may provide-

- (a) that any provisions referred to therein shall apply subject to such exceptions or modifications as may be specified in the notice;
- (b) that such provisions shall so apply either generally or in relation to such classes of works or classes of cases as may be so specified.

(3) No notice shall be issued under this section in respect of any country which is not a party to a convention relating to copyright to which the Republic is also a party, unless the Minister is satisfied that, in respect of the class of works to which the notice relates, provision has been or will be made under the laws of that country whereby adequate protection will be given to owners of copyright under this Act.

38

[S. 38 repealed by s. 30 of Act 125 of 1992.]

CHAPTER 5 MISCELLANEOUS PROVISIONS (ss 39-47)

39 Regulations

The Minister may make regulations-

- (a) as to any matter required or permitted by this Act to be prescribed by regulation;
- (b) in consultation with the Minister of Finance, prescribing the tariff of fees payable in respect of proceedings before the Copyright Tribunal referred to in section 29 (1);
- (c) in consultation with the Minister of Finance, prescribing the remuneration and allowances of members of the advisory committee referred to in section 40, and of its subcommittees, and the conditions upon which such members shall be appointed; and
- (cA) in consultation with the Minister of Finance, providing for the establishment, composition, funding and functions of collecting societies contemplated in section 9A, and any other matter that it may be necessary or expedient to regulate for the proper functioning of such societies;

[Para. (cA) inserted by s. 4 of Act 9 of 2002.]

- (d) generally, as to any matter which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.

[Date of commencement of s. 39: 30 June 1978.]

40 Advisory committee

(1) (a) The Minister shall appoint an advisory committee consisting of a judge or a senior advocate of the Supreme Court of South Africa as chairman and such *ex officio* and other members as the Minister may from time to time determine.

[Para. (a) substituted by s. 4 (a) of Act 61 of 1989.]

(b) A member of the advisory committee shall hold office for such period as the Minister may direct and shall be eligible for reappointment upon the expiration of his period of office.

(2) The advisory committee shall as to witnesses and their evidence have the powers of a commission under the Commissions Act, 1947 (Act 8 of 1947).

(3) The advisory committee may from time to time make recommendations to the Minister in regard to any amendments to this Act and to the Trade Marks Act, 1963 (Act 62 of 1963), the Designs Act, 1967 (Act 57 of 1967), and the Patents Act, 1978 (Act 57 of 1978), and shall advise the Minister on any matter referred to it by the Minister.

[Sub-s. (3) substituted by s. 4 (b) of Act 61 of 1989.]

(4) (a) The advisory committee may constitute and maintain subcommittees.

[Para. (a) substituted by s. 4 (c) of Act 61 of 1989.]

(b) The advisory committee shall appoint as members of the subcommittees such of its members and such other persons and for such periods of office as the advisory committee may from time to time determine.

(5) The advisory committee may call to its assistance any person it may deem necessary to assist it with, or to investigate matters relating to, the functions referred to in subsection (3).

[Sub-s. (5) substituted by s. 4 (d) of Act 61 of 1989.]

(6) The Registrar shall be responsible for the administration of the advisory committee and the subcommittees.

[Date of commencement of s. 40: 30 June 1978.]

41 Savings

(1) Nothing in this Act shall affect any right or privilege of the State or of any other person under any law not expressly repealed, amended or modified by this Act.

[Sub-s. (1) substituted by s. 31 (a) of Act 125 of 1992.]

(2) Nothing in this Act shall affect the right of the state or of any person deriving title from the state to sell, use or otherwise deal with articles forfeited under the laws relating to customs and excise, including any article forfeited by virtue of this Act or of any enactment repealed by this Act.

(3) The provisions of this Act shall not derogate from any rule of law relating to confidential or privileged information, unlawful competition or personality rights.

[Sub-s. (3) substituted by s. 31 (b) of Act 125 of 1992.]

(4) Subject to the preceding provisions of this section, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.

42

[S. 42 repealed by s. 32 of Act 125 of 1992.]

43 Application to work made before commencement of Act

This Act shall apply in relation to works made before the commencement of this Act as it applies in relation to works made thereafter: Provided that-

- (a) nothing in this Act contained shall-
- (i) subject to paragraph (d), affect the ownership, duration or existence of any copyright which subsists under the Copyright Act, 1965 (Act 63 of 1965); or
 - (ii) subject to paragraph (c), be construed as creating copyright in any type of work in which copyright could not subsist prior to 11 September 1965;

[Para. (a) amended by s. 14 (a) of Act 52 of 1984 and substituted by s. 33 (a) of Act 125 of 1992.]

(b)

[Para. (b) deleted by s. 14 (b) of Act 52 of 1984.]

(c) the copyright in a cinematograph film made before the commencement of this Act shall be governed by the relevant provisions of this Act, subject to the qualification, in the case of a cinematograph film treated as an original dramatic work under section 35 of the Third Schedule to the Designs Act, 1916 (Act 9 of 1916)-

- (i) that the owner of the copyright shall, if so required, remunerate the person who is the owner of the copyright in that original dramatic work for the purposes of that Act, which remuneration shall be determined by arbitration if agreement thereon cannot be reached; and
- (ii) that the owner of the copyright in the cinematograph film or any person deriving rights in respect of the cinematograph film from such owner shall in exercising such rights in the cinematograph film be deemed not to infringe any rights in such original dramatic work under the said Act; and
- (iii) that an act performed by virtue of a licence granted by the owner of the copyright in the original dramatic work under that Act and in existence before or at the time of coming into force of this subsection, shall be deemed to be performed or have been performed on the authority of the owner of the copyright in the cinematograph film.

[Para. (c) substituted by s. 33 (b) of Act 125 of 1992.]

(d) in the determination of the term of copyright contemplated in the proviso to section 3 (2) (a) in the case of a work in respect of which the copyright has expired at the commencement of the Copyright Amendment Act, 1984, on the ground that the period mentioned in the said paragraph has lapsed, it shall be deemed that, subject to any rights acquired by any person after the lapse of that period and before the said commencement, copyright did not expire on that ground.

[Para. (d) added by s. 14 (c) of Act 52 of 1984.]

44 Time when work is made

(1) For the purposes of this Act a work, except a broadcast or programme-carrying signal, shall be deemed to have been made at the time when it was first reduced to writing, recorded or otherwise reduced to material form.

(2) A broadcast shall be deemed to have been made at the time when it was first broadcast.

(3) A programme-carrying signal shall be deemed to have been made at the time when it was first transmitted by a satellite.

[S. 44 substituted by s. 34 of Act 125 of 1992.]

45 Regulation and control of circulation, presentation or exhibition of works

(1) Notwithstanding anything to the contrary in this Act contained, the Minister may make such regulations as he may consider necessary in regard to the circulation, presentation or exhibition of any work or production.

(2) Such regulations may empower any person specified therein to prohibit the circulation, presentation or exhibition of any such work or production or to authorize the circulation, presentation or exhibition thereof on such conditions as may be specified in those regulations.

(3) The circulation, presentation or exhibition of any work or production in pursuance of authority granted in terms of such regulations shall not constitute an infringement of copyright in such work or production, but the author shall not thereby be deprived of his right to a reasonable remuneration, which shall in default of agreement be determined by arbitration.

[Date of commencement of s. 45: to be proclaimed.]

46 Repeal of laws

The laws specified in the Schedule are hereby repealed to the extent set out in the third column of the Schedule: Provided that any proclamation, regulation or rule having effect under any provision so repealed and in force immediately prior to the commencement of this Act, shall continue in force after such commencement and may be repealed, amended or altered as if it had been made under this Act.

47 Short title and commencement

This Act shall be called the Copyright Act, 1978, and shall come into operation on 1 January 1979, except sections 1, 39 and 40, which shall come into operation upon promulgation of this Act in the *Gazette*, and except section 45, which shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

Schedule

No and year of Act	Title	Extent of Repeal
Act 63 of 1965	Copyright Act, 1965	The whole, except section 46
Act 56 of 1967	Copyright Amendment Act, 1967	The whole
Act 75 of 1972	Copyright Amendment Act, 1972	The whole
Act 64 of 1975	Copyright Amendment Act, 1975	The whole

COPYRIGHT AMENDMENT ACT 56 OF 1980

[ASSENTED TO 5 MAY 1980]

[DATE OF COMMENCEMENT: 23 MAY 1980]

(English text signed by the State President)

ACT

To amend the Copyright Act, 1978, so as to provide that originality shall be a requirement for copyright in any work; to apply certain provisions applying to a work, also to a substantial part of such work; to further define a diffusion service for certain purposes; to further define the circumstances in which reproduction of a work shall be permitted; to determine ownership of copyright; and to effect certain textual alterations; and to provide for matters connected therewith.

1

Amends section 1 of the Copyright Act 98 of 1978 by inserting subsection (2A).

2

Amends section 2 of the Copyright Act 98 of 1978, as follows: paragraph (a) substitutes in subsection (1) the words preceding paragraph (a); and paragraph (b) substitutes subsection (2).

3

Amends section 6 of the Copyright Act 98 of 1978, as follows: paragraph (a) substitutes the words preceding paragraph (a); and paragraph (b) substitutes subsection (3).

4

Amends section 7 of the Copyright Act 98 of 1978, as follows: paragraph (a) substitutes the words preceding paragraph (a); and paragraph (b) substitutes paragraph (d).

5

Amends section 8 (1) of the Copyright Act 98 of 1978, as follows: paragraph (a) substitutes the words preceding paragraph (a); and paragraph (b) substitutes paragraph (d).

6

Substitutes section 9 of the Copyright Act 98 of 1978.

7

Amends section 10 of the Copyright Act 98 of 1978 by substituting the words preceding paragraph (a).

8 and 9

Substitute respectively section 13 and 21 of the Copyright Act 98 of 1978.

10 Short title

This Act shall be called the Copyright Amendment Act, 1980.

COPYRIGHT AMENDMENT ACT 66 OF 1983

[ASSENTED TO 20 MAY 1983]

[DATE OF COMMENCEMENT: 17 OCTOBER 1983]
(except ss. 4 and 5: to be proclaimed)

(English text signed by the State President)

ACT

To amend the Copyright Act, 1978, with respect to certain definitions; so as to limit copyright in certain artistic works of which three-dimensional reproductions were made available to the public; to facilitate the establishment of certain facts in actions brought by virtue of certain provisions of the said Act; to make further provisions for the regulation and control of the distribution, performance or exhibition of works without the consent of the copyright owner; and to make provision for the regulation and control of the reproduction or adaptation of certain artistic works without the consent of the copyright owner; and to provide for incidental matters.

1

Amends section 1 (1) of the Copyright Act 98 of 1978, as follows: paragraph (a) substitutes paragraph (c) of the definition of 'artistic work'; paragraph (b) substitutes the definition of 'drawing'; paragraph (c) substitutes the definition of 'Minister'; and paragraph (d) adds paragraph (c) to the definition of 'reproduction'.

2

Amends section 15 of the Copyright Act 98 of 1978 by inserting subsection (3A).

3

Amends section 26 of the Copyright Act 98 of 1978 by adding subsection (8).

4 Substitution of section 45 of Act 98 of 1978

The following section is hereby substituted for section 45 of the principal Act:

'45 Regulation and control of distribution, performance or exhibition of works

(1) Notwithstanding anything to the contrary in this Act contained, the Minister may make such regulations as he may consider necessary in regard to the distribution, performance or exhibition of any work.

(2) Such regulations may empower any person specified therein to prohibit the distribution, performance or exhibition of any such work or to authorize the distribution, performance or exhibition thereof on such conditions as may be specified in those regulations.

(3) The distribution, performance or exhibition of any work in pursuance of authority granted in terms of such regulations shall not constitute an infringement of copyright in such work, but the copyright owner shall not thereby be deprived of any right which he may have had to obtain a reasonable remuneration, which shall in default or agreement be determined by arbitration.'

[Date of commencement of s. 4: to be proclaimed.]

5 Insertion of section 45A in Act 98 of 1978

The following section is hereby inserted in the principal Act after section 45:

'45A Regulation and control of the reproduction or adaptation of artistic works

(1) Notwithstanding anything to the contrary in this Act contained, the Minister may make such regulations as he may consider necessary in regard to the reproduction or adaptation, or the making available to the public of reproductions or adaptations, of any artistic work.

(2) Such regulations may empower any person specified therein to authorize the reproduction or adaptation, or the making available to the public of reproductions or adaptations, of any artistic work on such conditions as may be specified in those regulations.

(3) The reproduction or adaptation, or the making available to the public of reproductions or adaptations, of any artistic work in pursuance of authority granted in terms of such regulations shall not constitute an infringement of copyright in such work, but the copyright owner shall not thereby be deprived of any right which he may have had to obtain a reasonable remuneration, which shall in default or agreement be determined by arbitration.'

[Date of commencement of s. 5: to be proclaimed.]

6 Short title and commencement

(1) This Act shall be called the Copyright Amendment Act, 1983, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

COPYRIGHT AMENDMENT ACT 52 OF 1984

[ASSENTED TO 30 MARCH 1984]

[DATE OF COMMENCEMENT: 22 JUNE 1984]
(Unless otherwise indicated)

(Afrikaans text signed by the State President)

ACT

To amend the Copyright Act, 1978, so as to make provision for copyright in published editions; to extend the term of copyright in certain unpublished works; to further define the nature of copyright in cinematograph films and sound recordings; to create certain presumptions in respect of the proof of infringements of copyright in cinematograph films; to create certain new offences; and to make provision for increased penalties; and to provide for incidental matters.

1

Amends section 1 (1) of the Copyright Act 98 of 1978, as follows: paragraph **(a)** adds paragraph **(g)** to the definition of 'author'; paragraph **(b)** substitutes paragraph **(a)** of the definition of 'infringing copy'; and paragraph **(c)** inserts the definition of 'published edition'.

2

Amends section 2 of the Copyright Act 98 of 1978 by adding paragraph **(h)**.

3

Amends section 3 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** adds the proviso to paragraph **(a)**; and paragraph **(b)** adds paragraph **(f)**.

4

Amends section 4 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** deletes the word 'or' at the end of paragraph **(c)**; and paragraph **(b)** adds paragraph **(e)**.

5

Amends section 5 of the Copyright Act 98 of 1978 by substituting subsection (4).

6

Amends section 8 (1) of the Copyright Act 98 of 1978 by adding paragraph **(g)**.

7

Amends section 9 (1) of the Copyright Act 98 of 1978 by substituting paragraph **(b)**.

[Date of commencement of s. 7: 1 April 1989.]

8 and 9

Insert respectively sections 11A and 19A in the Copyright Act 98 of 1978.

10

Amends section 26 of the Copyright Act 98 of 1978 by adding subsections (9) and (10).

11

Amends section 27 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (1); paragraph **(b)** substitutes subsection (6); and paragraph **(c)** adds subsection (8).

12

Amends section 28 of the Copyright Act 98 of 1978.

13

Amends section 37 (1) of the Copyright Act 98 of 1978 by substituting paragraph (a).

14

Amends section 43 of the Copyright Act 98 of 1978, as follows: paragraph (a) substitutes in paragraph (a) the words preceding subparagraph (i); paragraph (b) deletes paragraph (b); and paragraph (c) adds paragraph (d).

15 Short title and commencement

(1) This Act shall be called the Copyright Amendment Act, 1984, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

COPYRIGHT AMENDMENT ACT 39 OF 1986

[ASSENTED TO 9 APRIL 1986]

[DATE OF COMMENCEMENT: 23 APRIL 1986]

(Afrikaans text signed by the State President)

ACT

To amend the Copyright Act, 1978, so as to provide that the exclusive licensee and the exclusive sub-licensee shall have the same rights to action and be entitled to the same legal remedies as the owner of the copyright; and to provide that their rights of action and legal remedies shall be concurrent with those of such owner.

1

Substitutes section 25 of the Copyright Act 98 of 1978.

2 Short title

This Act shall be called the Copyright Amendment Act, 1986.

COPYRIGHT AMENDMENT ACT 13 OF 1988

[ASSENTED TO 14 MARCH 1988]

[DATE OF COMMENCEMENT: 23 MARCH 1988]
(Unless otherwise indicated)

(Afrikaans text signed by the State President)

ACT

To amend the Copyright Act, 1978, so as to alter the designation of the Minister concerned; to abolish the protection granted for 10 years in respect of copyright in certain artistic works of which authorized reproductions were made; and to repeal the presumptions for proving an infringement of copyright in such works; and to provide for matters connected therewith.

1

Amends section 1 (1) of the Copyright Act 98 of 1978 by substituting the definition of 'Minister'.

2

(1) Amends section 15 of the Copyright Act 98 of 1978, as follows: paragraph *(a)* deletes subsection (3) *(a)* (i); and paragraph *(b)* deletes section (3A) *(b)*.

(2) Subsection (1) shall be deemed to have come into operation on 25 September 1987.

3

(1) Amends section 26 of the Copyright Act 98 of 1978 by deleting subsection (8).

(2) Subsection (1) shall be deemed to have come into operation on 25 September 1987.

4 Short title

This Act shall be called the Copyright Amendment Act, 1988.

COPYRIGHT AMENDMENT ACT 61 OF 1989

[ASSENTED TO 17 MAY 1989]

[DATE OF COMMENCEMENT: 1 APRIL 1989]
(Unless otherwise indicated)

(English text signed by the State President)

ACT

To amend the Copyright Act, 1978, so as to make provision relating to importing, selling and distribution in connection with the nature of copyright in cinematograph films and sound recordings; to provide that certain infringements in respect of certain cinematograph films will no longer be an offence; and to extend the functions of the advisory committee; and to provide for matters connected therewith.

1

Amends section 8 (1) of the Copyright Act 98 of 1978 by substituting paragraph *(g)*.

2

Amends section 9 of the Copyright Act 98 of 1978 by substituting paragraph *(b)*.

3

Amends section 27 of the Copyright Act 98 of 1978 by substituting subsection (1).

4

Amends section 40 of the Copyright Act 98 of 1978 as follows: paragraph *(a)* substitutes subsection (1) *(a)*; paragraph *(b)* substitutes subsection (3); paragraph *(c)* substitutes subsection (4) *(a)*; and paragraph *(d)* substitutes subsection (5).

[Date of commencement of s. 4: 1 August 1989.]

5 Short title and commencement

(1) This Act shall be called the Copyright Amendment Act, 1989, and shall, subject to the provisions of subsection (2), be deemed to have come into operation on 1 April 1989.

(2) Section 4 shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

COPYRIGHT AMENDMENT ACT 125 OF 1992

[ASSENTED TO 2 JULY 1992]

[DATE OF COMMENCEMENT: 10 JULY 1992]

(Afrikaans text signed by the State President)

ACT

To amend the Copyright Act, 1978, so as to amend, delete or insert certain definitions; to make provision that computer programs be eligible for copyright as a separate category of work; to further provide for the conditions to be met before works become eligible for copyright; to further regulate copyright in broadcasts and programme-carrying signals; to further provide for the protection of the moral rights of the author of a work; to further provide for dealing with the infringement of copyright and for the remedies available upon such infringement; to further provide for presumptions in proceedings relating to infringement of copyright; to further prescribe penalties for infringements of copyright; to further provide for the seizure of imported infringing copies; to further regulate the procedure relating to applications to the Copyright Tribunal; to extend the powers of the Copyright Tribunal regarding the granting of licences; and to make provision for appeals against decisions of the Copyright Tribunal; and to provide for matters connected therewith.

1

Amends section 1 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** adds paragraph **(d)** to the definition of 'adaption'; paragraph **(b)** substitutes paragraph **(c)** of the definition of 'artistic work'; paragraph **(c)** substitutes paragraphs **(c)**, **(e)** and **(f)** of the definition of 'author'; paragraph **(d)** adds paragraphs **(h)** and **(i)** to the definition of 'author'; paragraph **(e)** substitutes the definition of 'broadcast'; paragraph **(f)** substitutes the definition of 'cinematograph film'; paragraph **(g)** inserts the definition of 'computer program'; paragraph **(h)** substitutes the definition of 'copy'; paragraph **(i)** substitutes the definition of 'distribution'; paragraph **(j)** substitutes the definition of 'distributor'; paragraph **(k)** substitutes the definition of 'emitted signal'; paragraph **(l)** substitutes the definition of 'infringing copy'; paragraph **(m)** deletes the definition of 'licence'; paragraph **(n)** substitutes the definition of 'licence scheme'; paragraph **(o)** deletes the definition of 'licensing body'; paragraph **(p)** substitutes the definition of 'literary work'; paragraph **(q)** inserts the definition of 'musical work'; paragraph **(r)** substitutes the definition of 'performance'; paragraph **(s)** substitutes the definition of 'plate'; paragraph **(t)** substitutes the definition of 'programme'; paragraph **(u)** inserts the definition of 'programme-carrying signal'; paragraph **(v)** substitutes the definition of 'sound recording'; paragraph **(w)** inserts the definition of 'work'; and paragraph **(x)** adds subsections (4) and (5).

2

Amends section 2 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (1) **(d)**; paragraph **(b)** adds subsection (1) (i); paragraph **(c)** substitutes subsection (2); and paragraph **(d)** inserts subsection (2A).

3

Amends section 3 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (1); paragraph **(b)** substitutes subsection (2) **(b)**; and paragraph **(c)** substitutes subsection (3) **(a)**.

4

Amends section 4 (1) of the Copyright Act 98 of 1978 by inserting paragraph **(f)**.

5

Amends section 5 of the Copyright Act 98 of 1978 by substituting subsection (4).

6

Amends section 6 of the Copyright Act 98 of 1978 by substituting paragraph **(b)**.

7

Amends section 7 of the Copyright Act 98 of 1978 by substituting paragraph **(b)**.

8

Amends section 8 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (1) **(a)**; paragraph **(b)** substitutes subsection (1) **(g)**; and paragraph **(c)** deletes subsection (2).

9

Amends section 10 of the Copyright Act 98 of 1978 by substituting paragraph **(a)**.

10

Inserts section 11B in the Copyright Act 98 of 1978.

11

Amends section 12 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes in subsection (1) the words preceding paragraph **(a)**; paragraph **(b)** substitutes in subsection (1) the words following upon paragraph **(c)** (ii); paragraph **(c)** substitutes subsection (9); paragraph **(d)** substitutes subsection (10); paragraph **(e)** substitutes subsection (12); and paragraph **(f)** adds subsection (13).

12

Substitutes section 14 of the Copyright Act 98 of 1978.

13

Amends section 15 of the Copyright Act 98 of 1978 by substituting subsection (4).

14 to 17 inclusive

Substitute respectively sections 16, 17, 18 and 19A of the Copyright Act 98 of 1978.

18

Inserts section 19B in the Copyright Act 98 of 1978.

19

Substitutes section 20 of the Copyright Act 98 of 1978.

20

Amends section 23 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (1); paragraph **(b)** deletes in subsection (2) the word 'or' at the end of paragraph **(b)**, adds the word 'or' at the end of paragraph **(c)** and inserts paragraph **(d)**; and paragraph **(c)** deletes subsection (4).

21

Amends section 24 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (1); paragraph **(b)** inserts subsections (1A), (1B) and (1C); and paragraph **(c)** substitutes subsection (2).

22

Amends section 25 of the Copyright Act 98 of 1978 by adding subsection (2), the existing section becoming subsection (1).

23

Substitutes section 26 of the Copyright Act 98 of 1978.

24

Amends section 27 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (6); and paragraph **(b)** deletes subsections (7) and (8).

25

Amends section 28 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes in subsection (1) the words preceding paragraph **(a)**; and paragraph **(b)** substitutes subsection (5).

26

Amends section 29 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (3) **(c)** (v); and paragraph **(b)** adds subsection (6).

27 and 28

Substitute respectively sections 30 and 36 of the Copyright Act 98 of 1978.

29

Amends section 37 (1) of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes paragraph **(a)**; and paragraph **(b)** substitutes paragraph **(e)**.

30

Repeals section 38 of the Copyright Act 98 of 1978.

31

Amends section 41 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes subsection (1); and paragraph **(b)** substitutes subsection (3).

32

Repeals section 42 of the Copyright Act 98 of 1978.

33

Amends section 43 of the Copyright Act 98 of 1978, as follows: paragraph **(a)** substitutes paragraph **(a)**; and paragraph **(b)** substitutes paragraph **(c)**.

34

Substitutes section 44 of the Copyright Act 98 of 1978.

35 Short title

This Act shall be called the Copyright Amendment Act, 1992.

COPYRIGHT AMENDMENT ACT 9 OF 2002

[ASSENTED TO 18 JUNE 2002]

[DATE OF COMMENCEMENT: 25 JUNE 2002]

(English text signed by the President)

ACT

To amend the Copyright Act, 1978, so as to define an expression and to amend a definition; and to make further provision regarding the nature of copyright in sound recordings; and to provide for matters connected therewith.

1

Amends section 1 (1) of the Copyright Act 98 of 1978, as follows: paragraph *(a)* inserts the definition of 'collecting society'; and paragraph *(b)* substitutes the definition of 'Minister'.

2

Substitutes section 9 of the Copyright Act 98 of 1978.

3

Inserts section 9A in the Copyright Act 98 of 1978.

4

Amends section 39 of the Copyright Act 98 of 1978 by inserting paragraph *(cA)*.

5 **Short title**

This Act is called the Copyright Amendment Act, 2002.

MERCHANDISE MARKS ACT 17 OF 1941

[ASSENTED TO 7 APRIL 1941]

[DATE OF COMMENCEMENT: 18 OCTOBER 1941]

(Signed by the Governor-General in English)

as amended by

Merchandise Marks Amendment Act 3 of 1946
Merchandise Marks Amendment Act 26 of 1951
Merchandise Marks Amendment Act 39 of 1952
Merchandise Marks Amendment Act 47 of 1954
Merchandise Marks Amendment Act 55 of 1967
Merchandise Marks Amendment Act 54 of 1987
General Law Amendment Act 49 of 1996
Intellectual Property Laws Amendment Act 38 of 1997
Merchandise Marks Amendment Act 50 of 2001
Merchandise Marks Amendment Act 61 of 2002
Consumer Protection Act 68 of 2008

NOTE: Ss. 8 and 9 of this Act were suspended until further notice by GN 1682 of 9 August 1946.

Regulations under this Act

ACT

To make provision concerning the marking of merchandise and of coverings in or with which merchandise is sold and the use of certain words and emblems in connection with business.

1 Definitions

In this Act, unless the context indicates otherwise-

'apply to' means emboss, impress, engrave, etch or print upon or weave into or otherwise-

- (a) work into or onto;
- (b) annex or affix to; or
- (c) incorporate in;

[Definition of 'apply to' substituted by s. 1 (a) of Act 38 of 1997.]

'bottle'

[Definition of 'bottle' deleted by s. 1 (b) of Act 38 of 1997.]

'convention country' means any country or group of countries declared a convention country or convention countries in terms of section 63 of the Trade Marks Act, 1993 (Act 194 of 1993);

[Definition of 'convention country' inserted by s. 1 (a) of Act 50 of 2001.]

'covering' includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, wrapper or container;

'device' means any visual representation or illustration capable of being reproduced upon a surface, whether by printing or otherwise, but does not include a trade mark;

[Definition of 'device' inserted by s. 1 (c) of Act 38 of 1997 and substituted by s. 1 (b) of Act 50 of 2001.]

'document' means recorded information regardless of form or medium;

[Definition of 'document' inserted by s. 1 (c) of Act 38 of 1997.]

'event' means any exhibition, show or competition of a sporting, recreational or entertainment nature which is-

(a) held or to be held in public;

(b) likely to attract the attention of the public or to be newsworthy; and

(c) financed or subsidised by commercial sponsorship,

and includes any broadcast of such exhibition, show or competition;

[Definition of 'event' inserted by s. 1 (a) of Act 61 of 2002.]

'false trade description' means any trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, if that alteration makes the description false in a material respect;

[Definition of 'false trade description' substituted by s. 1 (d) of Act 38 of 1997.]

'Gazette'

[Definition of 'Gazette' inserted by s. 1 (a) of Act 39 of 1952 and deleted by s. 1 of Act 49 of 1996.]

'goods' means anything which is the subject of trade or manufacture;

'inspector' means-

(a) any member as defined in section 1 of the South African Police Service Act, 1995 (Act 68 of 1995), of or above the rank of sergeant;

(b) the Commissioner for Customs and Excise or any officer as defined in section 1 (1) of the Customs and Excise Act, 1964 (Act 91 of 1964);

(c) any officer appointed under section 3;

[Definition of 'inspector' substituted by s. 1 (f) of Act 38 of 1997.]

'label' includes any band or ticket;

'mark' means any sign capable of being represented graphically, and includes a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned, but does not include a trade mark;

[Definition of 'mark' substituted by s. 1 (c) of Act 50 of 2001.]

'Minister' means the Minister of Trade and Industry;

[Definition of 'Minister' substituted by s. 1 of Act 54 of 1987 and by s. 1 (g) of Act 38 of 1997.]

'name' includes an abbreviation or addition to a name, but does not include a trade mark;

[Definition of 'name' substituted by s. 1 (d) of Act 50 of 2001.]

'police officer'

[Definition of 'police officer' deleted by s. 1 (h) of Act 38 of 1997.]

'premises' includes land, any building or structure, or any vehicle, ship, boat or aircraft or other conveyance;

[Definition of 'premises' inserted by s. 1 (i) of Act 38 of 1997.]

'protected event' means an event designated as such under section 15A;

[Definition of 'protected event' inserted by s. 1 (b) of Act 61 of 2002.]

'sell' includes expose for sale or have in possession for purposes of sale or any purpose of trade or manufacture, and the word 'sale' has a corresponding meaning;

[Definition of 'sell' amended by s. 1 (1) of Act 47 of 1954.]

'Territory'

[Definition of 'Territory' inserted by s. 1 (b) of Act 39 of 1952 and deleted by s. 1 of Act 49 of 1996.]

'trade description' means any description, statement or other indication, direct or indirect, as to the number, quantity, measure, gauge or weight of any goods, or as to the name of the manufacturer or producer or as to the place or country in which any goods were made or produced, or as to the mode of manufacturing or producing any goods, or as to the material of which any goods consist, or as to any goods being the subject of an existing patent, privilege, or copyright, and includes any figure, word or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the aforementioned matters, but does not include a trade mark;

[Definition of 'trade description' substituted by s. 1 (e) of Act 50 of 2001.]

'trade mark' means a trade mark as defined in section 2 (1) of the Trade Marks Act, 1993 (Act 194 of 1993), and includes a well-known trade mark contemplated in section 35 of that Act.

[Definition of 'trade mark' amended by s. 1 (c) of Act 39 of 1952 and by s. 1 of Act 49 of 1996 and substituted by s. 1 (k) of Act 38 of 1997 and by s. 1 (f) of Act 50 of 2001.]

'Union'

[Definition of 'Union' added by s. 1 (d) of Act 39 of 1952 and deleted by s. 1 of Act 49 of 1996.]

2

[S. 2 substituted by s. 2 of Act 38 of 1997 and repealed by s. 121 (2) (a) of Act 68 of 2008.]

3

[S. 3 substituted by s. 3 of Act 38 of 1997 and repealed by s. 121 (2) (a) of Act 68 of 2008.]

4

[S. 4 amended by s. 2 of Act 47 of 1954, substituted by s. 4 of Act 38 of 1997 and repealed by s. 121 (2) (a) of Act 68 of 2008.]

5

[S. 5 substituted by s. 5 of Act 38 of 1997 and repealed by s. 121 (2) (a) of Act 68 of 2008.]

6

[S. 6 amended by s. 1 of Act 26 of 1951, substituted by s. 6 of Act 38 of 1997 and amended by s. 2 of Act 50 of 2001 and repealed by s. 121 (2) (a) of Act 68 of 2008.]

7

[S. 7 substituted by s. 7 of Act 38 of 1997 and by s. 3 of Act 50 of 2001 and repealed by s. 121 (2) (a) of Act 68 of 2008.]

8

[S. 8 amended by ss. 8 and 18 of Act 38 of 1997 and by s. 4 of Act 50 of 2001 and repealed by s. 121 (2) **(a)** of Act 68 of 2008.]

9

[S. 9 substituted by s. 9 of Act 38 of 1997 and by s. 5 of Act 50 of 2001 and repealed by s. 121 (2) **(a)** of Act 68 of 2008.]

10

[S. 10 amended by s. 1 of Act 3 of 1946, by s. 2 of Act 26 of 1951 and by s. 18 of Act 38 of 1997 and repealed by s. 121 (2) **(a)** of Act 68 of 2008.]

11

[S. 11 amended by s. 18 of Act 38 of 1997 and repealed by s. 121 (2) **(a)** of Act 68 of 2008.]

12 and 13

[Ss. 12 and 13 repealed by s. 121 (2) **(a)** of Act 68 of 2008.]

14 Unauthorized use of certain emblems

(1) For purposes of this section a person uses a mark or trade mark if he or she uses it-

- (a)** in connection with his or her trade, business, profession or occupation; or
- (b)** in connection with a mark, trade mark or trade description applied by him or her to goods made, produced or sold by him or her.

[Sub-s. (1) substituted by s. 6 of Act 50 of 2001.]

(1A) **(a)** No person may use a mark or trade mark which consists of or contains the national flag of a convention country, or an imitation from a heraldic point of view, without authorization of the competent authority of the convention country or without being in possession of an authorization in writing signed by or on behalf of the Minister.

(b) Paragraph **(a)** does not apply if no authorization for the use of a mark or trade mark contemplated in that paragraph is required by the convention country.

[Sub-s. (1A) inserted by s. 6 of Act 50 of 2001.]

(1B) No person may use a mark or trade mark which consists of or contains the armorial bearings or any other state emblem, of the Republic or a convention country, or an imitation from a heraldic point of view, without authorization of the competent authority of the Republic or convention country, as the case may be.

[Sub-s. (1B) inserted by s. 6 of Act 50 of 2001.]

(1C) No person may use a mark or trade mark which consists of or contains an official sign or hallmark adopted by the Republic or a convention country, or an imitation from a heraldic point of view, and which indicates control and warranty in relation to goods or services of the same or similar kind as those in relation to which such official sign or hallmark indicates control and warranty, without authorization of the competent authority of the Republic or convention country, as the case may be.

[Sub-s. (1C) inserted by s. 6 of Act 50 of 2001.]

(1D) **(a)** No person may use a mark or trade mark which consists of or contains the flag, armorial bearings or any other emblem, or an imitation from a heraldic point of

view, or the name, or abbreviation of the name, of any international organization of which any convention country is a member, without authorization by such organization.

(b) Paragraph (a) does not apply if the use of the mark or trade mark contemplated in that paragraph does not suggest to the public that a connection exists between the organization and the mark or its proprietor, or is not likely to mislead the public as to the existence of a connection between the organization and the mark or its proprietor.

[Sub-s. (1D) inserted by s. 6 of Act 50 of 2001.]

(1E) Any person who contravenes or fails to comply with any provision of subsection (1A), (1B), (1C) or (1D) shall be guilty of an offence.

[Sub-s. (1E) inserted by s. 6 of Act 50 of 2001.]

(1F) This section does not apply to a trade mark registered before 1 February 1941.

[Sub-s. (1F) inserted by s. 6 of Act 50 of 2001.]

(1G) Subsections (1B), (1C) and (1D) apply to a state emblem, official sign or hallmark of a convention country, and the emblem or name, or abbreviation of the name, of an international organization only and to the extent that-

- (a) the convention country or international organization has notified the Republic in accordance with Article 6^{ter} of the Paris Convention that it desires to protect that emblem, sign, hallmark, name or abbreviation, as the case may be;
- (b) the notification contemplated in paragraph (a) is in force; and
- (c) the Republic has not objected to the notification contemplated in paragraph (a) in accordance with Article 6^{ter} of the Paris Convention.

[Sub-s. (1G) inserted by s. 6 of Act 50 of 2001.]

(1H) Subsection (1B) or (1C) shall not prevent the use of a trade mark by any citizen of a country who is authorized to make use of a state emblem, official sign or hallmark of that country, notwithstanding the fact that it is similar to that of another country.

[Sub-s. (1H) inserted by s. 6 of Act 50 of 2001.]

(2) Any person who uses in connection with his or her trade, business, profession or occupation any device, emblem, title or words in such a manner as to be likely to lead other persons to believe that-

- (a) his or her trade, business, profession or occupation is carried on under the patronage of; or
- (b) he or she is employed by or supplies goods to,

the President, any State department or a provincial government, without authority in writing signed by or on behalf of the President, the Minister administering that department or the Premier of the province concerned, as the case may be, shall be guilty of an offence.

[S. 14 amended by s. 2 of Act 39 of 1952 and by s. 1 of Act 55 of 1967, substituted by s. 2 of Act 54 of 1987, amended by s. 1 of Act 49 of 1996 and substituted by s. 10 of Act 38 of 1997.]

15 Use of certain marks may be prohibited

(1) The Minister may, after such investigation as he or she may think fit, by notice in the **Gazette**, prohibit either absolutely or conditionally the use of-

- (a) the National Flag, or any former National Flag, of the Republic; or
- (b) any mark, word, letter or figure or any arrangement or combination thereof,

in connection with any trade, business, profession, occupation or event, or in connection with a trade mark, mark or trade description applied to goods.

[Sub-s. (1) substituted by s. 11 of Act 38 of 1997.]

(2) The Minister may, if he is satisfied that the circumstances require it, by notice in the **Gazette**, withdraw, amend or qualify any notice issued in terms of subsection (1).

(3) Any person who contravenes any such absolute prohibition or fails to comply with any condition prescribed in any such notice shall be guilty of an offence.

15A Abuse of trade mark in relation to event

(1) (a) The Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the **Gazette** designate an event as a protected event and in that notice stipulate the date-

- (i) with effect from which the protection commences; and
- (ii) on which the protection ends, which date may not be later than one month after the completion or termination of the event.

(b) The Minister may not designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities.

(2) For the period during which an event is protected, no person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event.

(3) For the purposes of subsection (2), the use of a trade mark includes-

- (a) any visual representation of the trade mark upon or in relation to goods or in relation to the rendering of services;
- (b) any audible reproduction of the trade mark in relation to goods or the rendering of services; or
- (c) the use of the trade mark in promotional activities,

which in any way, directly or indirectly, is intended to be brought into association with or to allude to an event.

(4) Any person who contravenes subsection (2) shall be guilty of an offence.

(5) For the purposes of this section 'trade mark' includes a mark.

[S. 15A inserted by s. 2 of Act 61 of 2002.]

16

[S. 16 substituted by s. 12 of Act 38 of 1997 and repealed by s. 121 (2) (a) of Act 68 of 2008.]

17

[S. 17 amended by s. 2 of Act 55 of 1967, substituted by s. 13 of Act 38 of 1997 and repealed by s. 121 (2) **(a)** of Act 68 of 2008.]

18 Evidence

(1)

[Sub-s. (1) amended by s. 3 of Act 26 of 1951 and deleted by s. 14 **(a)** of Act 38 of 1997.]

(2) In any prosecution for an offence under the provisions of this Act evidence that any imported goods were shipped at any port shall be *prima facie* evidence that those goods were made or produced in the country within which that port is situated.

(3) If in the prosecution of any person for an offence referred to in section 7 it is proved that-

- (a)** the accused conducts business in goods of the same or similar type as the goods to which any false trade description was applied; and
- (b)** the goods-
 - (i) were found in possession of the accused; or
 - (ii) the existence of which the accused was aware of or could reasonably be expected to have been aware of, were found on or in premises of which the accused was on the particular day the owner, occupier, manager or person in charge,

it shall be presumed, until the contrary is proved, that the accused offered for sale or hire the goods.

[Sub-s. (3) added by s. 14 **(b)** of Act 38 of 1997.]

19

[S. 19 repealed by s. 15 of Act 38 of 1997.]

20 Penalties

(1) **(a)** Any person convicted of an offence in terms of this Act, except section 5, shall be liable-

- (i) in the case of a first conviction, to a fine not exceeding R5 000 for each article to which the offence relates or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment;
- (ii) in any other case, to a fine not exceeding R10 000 for each article to which the offence relates or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(b) Any person convicted of an offence referred to in section 5 shall be liable to a fine or to imprisonment for a period not exceeding six months.

[Sub-s. (1) substituted by s. 16 of Act 38 of 1997.]

(2) Whenever any person is convicted of an offence under the provisions of this Act, the court by which he is convicted may, in addition to any other penalty which may be imposed, order the confiscation of all or any part of the goods in respect of which the offence was committed, and goods so ordered to be confiscated shall be disposed of as the Minister may direct.

21 Repeal of laws

The Merchandise Marks Act, 1888 (Act 12 of 1888), and the Merchandise Marks Amendment Act, 1889 (Act 14 of 1889), of the Cape of Good Hope, the Merchandise Marks Law, 1888 (Law 22 of 1888), and Law 11 of 1889 of Natal, and the Merchandise Marks Ordinance, 1903 (Ordinance 47 of 1903), of the Transvaal are hereby repealed.

21bis

[S. 21**bis** inserted by s. 3 of Act 39 of 1952, substituted by s. 3 of Act 55 of 1967 and repealed by s. 1 of Act 49 of 1996.]

22 Short title and commencement of Act

This Act shall be called the Merchandise Marks Act, 1941, and shall come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*, which date shall not be earlier than six months after the date on which this Act is first published in the *Gazette* as a law.

MERCHANDISE MARKS AMENDMENT ACT 3 OF 1946

[ASSENTED TO 28 MARCH 1946]

[DATE OF COMMENCEMENT: 28 MARCH 1946]

(Afrikaans text signed by the Governor-General)

ACT

To amend the Merchandise Marks Act, 1941.

1

Amends section 10 of the Merchandise Marks Act 17 of 1941.

2 Short title

This Act shall be called the Merchandise Marks Amendment Act, 1946.

MERCHANDISE MARKS AMENDMENT ACT 26 OF 1951

[ASSENTED TO 26 APRIL 1951]

[DATE OF COMMENCEMENT: 4 MAY 1951]

(English text signed by the Governor-General)

ACT

To amend the Merchandise Marks Act, 1941.

1 to 3 inclusive

Amend respectively the following sections of the Merchandise Marks Act 17 of 1941: 6, 10, 18.

4 Short title

This Act shall be called the Merchandise Marks Amendment Act, 1951.

MERCHANDISE MARKS AMENDMENT ACT 47 OF 1954

[ASSENTED TO 18 JUNE 1954]

[DATE OF COMMENCEMENT: 30 JUNE 1954]
(Unless otherwise indicated)

(English text signed by the Governor-General)

ACT

To amend the Merchandise Marks Act, 1941.

1

Amends section 1 of the Merchandise Marks Act 17 of 1941.
[Date of commencement of s. 1: 18 October 1941.]

2

Amends section 4 of the Merchandise Marks Act 17 of 1941.

3 Short title

This Act shall be called the Merchandise Marks Amendment Act, 1954.

MERCHANDISE MARKS AMENDMENT ACT 55 OF 1967

[ASSENTED TO 1 MAY 1967]

[DATE OF COMMENCEMENT: 10 MAY 1967]

(Afrikaans text signed by the State President)

ACT

To amend the provisions of the Merchandise Marks Act, 1941, relating to the unauthorized use of certain emblems, the prohibition relating to the sale of bottles marked with the owner's name and the application of the said Act.

1

(1) Amends section 14 of the Merchandise Marks Act 17 of 1941.

(2) The amendment effected by subsection (1) *(b)* shall not apply to the use by any person of anything which he lawfully used for a continuous period of one year immediately prior to the commencement of this Act.

2

Amends section 17 of the Merchandise Marks Act 17 of 1941.

3

Substitutes section 21 of the Merchandise Marks Act 17 of 1941.

4 Short title

This Act shall be called the Merchandise Marks Amendment Act, 1967.

MERCHANDISE MARKS AMENDMENT ACT 54 OF 1987

[ASSENTED TO 9 SEPTEMBER 1987]

[DATE OF COMMENCEMENT: 18 SEPTEMBER 1987]

(Afrikaans text signed by the State President)

ACT

To amend the Merchandise Marks Act, 1941, so as to substitute the definition of 'Minister'; to abolish certain acts which constitute offences; and to substitute or delete certain obsolete references therein; and to make provision for matters connected therewith.

1

Amends section 1 of the Merchandise Marks Act 17 of 1941 by substituting the definition of 'Minister'.

2

Substitutes section 14 of the Merchandise Marks Act 17 of 1941.

3 Short title

This Act shall be called the Merchandise Marks Amendment Act, 1987.

MERCHANDISE MARKS AMENDMENT ACT 50 OF 2001

[ASSENTED TO 7 DECEMBER 2001]

[DATE OF COMMENCEMENT: 14 DECEMBER 2001]

(English text signed by the President)

ACT

To amend the Merchandise Marks Act, 1941, so as to define an expression and to amend certain definitions; to make further provision regarding the application of trade descriptions to goods and the alteration of trade marks; to clarify the scope of the Act in its application to trade marks; and to prohibit the unauthorized use of the national flags, armorial bearings and other official signs of Convention countries; and to provide for matters connected therewith.

1

Amends section 1 of the Merchandise Marks Act 17 of 1941, as follows: paragraph (a) inserts the definition of 'convention country'; paragraph (b) amends the definition of 'device'; paragraph (c) substitutes the definition of 'mark'; and paragraph (d) substitutes the definition of 'name'; paragraph (e) substitutes the definition of 'trade description'; and paragraph (f) substitutes the definition of 'trade mark'.

2

Amends section 6 of the Merchandise Marks Act 17 of 1941 by substituting the heading.

3

Substitutes section 7 of the Merchandise Marks Act 17 of 1941.

4

Amends section 8 of the Merchandise Marks Act 17 of 1941 by substituting subsection (2).

5

Substitutes section 9 of the Merchandise Marks Act 17 of 1941.

6

Amends section 14 of the Merchandise Marks Act 17 of 1941 by substituting subsections (1), (1A), (1B), (1C), (1D), (1E), (1F), (1G) and (1H) for subsection (1).

7 Short title

This Act is called the Merchandise Marks Amendment Act, 2001.

MERCHANDISE MARKS AMENDMENT ACT 61 OF 2002

[ASSENTED TO 30 DECEMBER 2002]

[DATE OF COMMENCEMENT: 17 JANUARY 2003]

(English text signed by the President)

ACT

To amend the Merchandise Marks Act, 1941, so as to define 'event' and 'protected event'; to prohibit the abuse of a trade mark in relation to an event; and to provide for matters connected therewith.

1

Amends section 1 of the Merchandise Marks Act 17 of 1941, as follows: paragraph *(a)* inserts the definition of 'event'; and paragraph *(b)* inserts the definition of 'protected event'.

2

Inserts section 15A in the Merchandise Marks Act 17 of 1941.

3 Short title

This Act is called the Merchandise Marks Amendment Act, 2002.

CUSTOMS AND EXCISE ACT 91 OF 1964

[ASSENTED TO 27 JULY 1964]

[DATE OF COMMENCEMENT: 1 JANUARY 1965]

(English text signed by the State President)

as amended by

Customs and Excise Amendment Act 95 of 1965
Customs and Excise Amendment Act 57 of 1966
Customs and Excise Amendment Act 96 of 1967
Customs and Excise Amendment Act 85 of 1968
South-West Africa Affairs Act 25 of 1969
Customs and Excise Amendment Act 105 of 1969
Customs and Excise Amendment Act 98 of 1970
Customs and Excise Amendment Act 89 of 1971
Customs and Excise Amendment Act 103 of 1972
Customs and Excise Amendment Act 68 of 1973
Customs and Excise Amendment Act 7 of 1974
Parliamentary Service Act 33 of 1974
Publications Act 42 of 1974
Second Customs and Excise Act 64 of 1974
Customs and Excise Amendment Act 71 of 1975
Customs and Excise Amendment Act 105 of 1976
Customs and Excise Amendment Act 12 of 1977
Second Customs and Excise Amendment Act 112 of 1977
Customs and Excise Amendment Act 93 of 1978
Customs and Excise Amendment Act 110 of 1979
Customs and Excise Amendment Act 98 of 1980
Customs and Excise Amendment Act 86 of 1982
Customs and Excise Amendment Act 89 of 1983
Customs and Excise Amendment Act 89 of 1984
Customs and Excise Amendment Act 101 of 1985
Customs and Excise Amendment Act 52 of 1986
Transfer of Powers and Duties of the State President Act 97 of 1986
Customs and Excise Amendment Act 84 of 1987
Customs and Excise Amendment Act 69 of 1988
Liquor Products Act 60 of 1989
Customs and Excise Amendment Act 68 of 1989
Customs and Excise Amendment Act 59 of 1990
Customs and Excise Amendment Act 111 of 1991
Customs and Excise Amendment Act 61 of 1992
Customs and Excise Second Amendment Act 105 of 1992
Customs and Excise Amendment Act 98 of 1993
Customs and Excise Amendment Act 19 of 1994
Customs and Excise Amendment Act 45 of 1995

Customs and Excise Amendment Act 44 of 1996
Board on Tariffs and Trade Amendment Act 16 of 1997
Taxation Laws Amendment Act 27 of 1997
South African Revenue Service Act 34 of 1997
Taxation Laws Amendment Act 30 of 1998
Taxation Laws Amendment Act 32 of 1999
Revenue Laws Amendment Act 53 of 1999
Taxation Laws Amendment Act 30 of 2000
Revenue Laws Amendment Act 59 of 2000
Revenue Laws Amendment Act 19 of 2001
Second Revenue Laws Amendment Act 60 of 2001
Taxation Laws Amendment Act 30 of 2002
Revenue Laws Amendment Act 74 of 2002
Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003
Revenue Laws Amendment Act 45 of 2003
Taxation Laws Amendment Act 16 of 2004
Revenue Laws Amendment Act 32 of 2004
Second Revenue Laws Amendment Act 34 of 2004
Taxation Laws Amendment Act 9 of 2005
Taxation Laws Second Amendment Act 10 of 2005
Revenue Laws Amendment Act 31 of 2005
Revenue Laws Second Amendment Act 32 of 2005
National Credit Act 34 of 2005
Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006
Second Small Business Tax Amnesty and Amendment of Taxation Laws Act 10 of 2006
Revenue Laws Amendment Act 20 of 2006
Revenue Laws Second Amendment Act 21 of 2006
Taxation Laws Second Amendment Act 9 of 2007
Revenue Laws Amendment Act 35 of 2007
Revenue Laws Second Amendment Act 36 of 2007
Revenue Laws Amendment Act 60 of 2008
Revenue Laws Second Amendment Act 61 of 2008
Taxation Laws Amendment Act 17 of 2009
Taxation Laws Second Amendment Act 18 of 2009
Voluntary Disclosure Programme and Taxation Laws Second Amendment Act 8 of 2010
Taxation Laws Amendment Act 24 of 2011
Taxation Laws Second Amendment Act 25 of 2011

NOTE: (1) Users are advised to consult the Amendment Acts with regard to the commencement dates of the various provisions.

(2) Schedules 1 to 6 inclusive and Schedule 8 are not reproduced, but are available from the Office of the Commissioner of Customs and Excise. Schedule 7 was deleted by s. 47 of Act 59 of 1990.

ACT

To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax and an environmental

levy; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto.

[Long title substituted by s. 40 of Act 112 of 1977, by s. 41 of Act 84 of 1987, by s. 42 of Act 59 of 1990, by s. 66 of Act 30 of 2000, by s. 72 of Act 32 of 2004 and by s. 28 (1) of Act 32 of 2005.]

88 Seizure

(1) **(a)** An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.

(b) Such ship, vehicle, plant, material or goods may be so detained where they are found or shall be removed to and stored at a place of security determined by such officer, magistrate or member of the police force, at the cost, risk and expense of the owner, importer, exporter, manufacturer or the person in whose possession or on whose premises they are found, as the case may be.

(bA) No person shall remove any ship, vehicle, plant, material or goods from any place where it was so detained or from a place of security determined by an officer, magistrate or member of the police force.

[Para. **(bA)** inserted by s. 10 of Act 98 of 1993.]

(c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner may seize that ship, vehicle, plant, material or goods.

[Para. **(c)** substituted by s. 59 of Act 45 of 1995.]

(d) The Commissioner may seize any other ship, vehicle, plant, material or goods liable to forfeiture under this Act.

[Para. **(d)** substituted by s. 59 of Act 45 of 1995.]

[Sub-s. (1) substituted by s. 15 of Act 68 of 1989.]

(2) **(a)** (i) If any goods liable to forfeiture under this Act cannot readily be found, the Commissioner may, notwithstanding anything to the contrary in this Act contained, demand from any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the provisions of this Act or committed any offence under this Act rendering such goods liable to forfeiture, payment of an amount equal to the value for duty purposes or the export value of such goods plus any unpaid duty thereon, as the case may be.

(ii) For the purposes of subparagraph (i) the value for duty purposes shall be calculated in terms of the provisions of this Act relating to such value whether or not the goods in question are subject to *ad valorem* duty or to a duty calculated according to a unit of quantity, volume or other measurement, as the case may be.

[Para. **(a)** substituted by s. 30 of Act 112 of 1977 and by s. 28 of Act 84 of 1987.]

(b) If the amount demanded is not paid within a period of fourteen days after the demand for payment was made it may be recovered in terms of the provisions of this Act as if it were a forfeiture incurred under this Act.

(c) The provisions of this Act shall, in so far as they can be applied, apply *mutatis mutandis* in respect of any amount paid to the Commissioner or recovered in terms of this subsection, as if such amount were the goods in question and as if such amount had been seized under subsection (1).

[Sub-s. (2) added by s. 12 of Act 85 of 1968.]

113A Powers and duties of officers in connection with counterfeit goods

- (1) An officer may-
- (a) detain any goods to ascertain whether such goods are counterfeit goods as contemplated in the Counterfeit Goods Act, 1997 (Act 37 of 1997); or
 - (b) notwithstanding anything to the contrary contained in the said Act, while acting as an inspector as defined in that Act-
 - (i) seize and detain any goods when requested to do so in accordance with the provisions of section 15 of the said Act whether or not such goods are under customs control;
 - (ii) seize and detain any goods in accordance with the provisions of the said Act where such officer has reasonable cause to believe that such goods are *prima facie* counterfeit goods as defined in that Act while such goods are under customs control; or
 - (iii) seize and detain any goods while such goods are in transit through the Republic or transit goods found in the area of control of any Controller where such officer has reasonable cause to believe that such goods are *prima facie* counterfeit goods as defined in the said Act.
- (2) An officer-
- (a) may refuse to detain any goods as contemplated in subsection (1) (b) (i) in circumstances where the request to do so does not conform with the requirements of the said Act; and
 - (b) shall not seize or detain any counterfeit goods where the Commissioner is not indemnified against claims of any nature which may result from such seizure and detention.
- (3) Subject to section 43 (6), no goods seized or detained by an officer acting as an inspector as contemplated in the Counterfeit Goods Act, 1997, may be stored in a State warehouse except where such goods are detained or seized for purposes of this Act.
- (4) Notwithstanding anything to the contrary contained in any other law, no person shall be entitled to any compensation for any loss or damage to any goods to which this section relates or any loss or damage sustained resulting from any *bona fide* act of any officer in respect of such goods.
- (5) The Commissioner may make rules-
- (a) regarding the procedures to be followed by an officer when exercising any power or performing any duty in connection with the detention of any goods under the provisions of subsection (1) (a) or the seizure and detention of counterfeit goods;
 - (b) prescribing such forms as may be required to be completed for purposes of this section; and
 - (c) concerning any other matter which the Commissioner may consider reasonably necessary and useful for the purpose of administering the provisions of this section.

[S. 113A inserted by s. 52 of Act 30 of 2002.]

[NB: S. 113A has been repealed by s. 21 (1) of the Revenue Laws Second Amendment Act 36 of 2007, a provision which will come into operation on the date of coming into operation of s. 17 (1) of Act 36 of 2007. **]**

**1997年法律第37号
模倣品取締法による手続**

1. 税関/国境警察による物品の差押



2. サンプルを代理人に送付



3. a) 差押通知日から5営業日以内に専門家の宣誓供述書を税関/警察に提出

b) 最長で10裁判所開廷日まで延長可能（正当理由が必要）

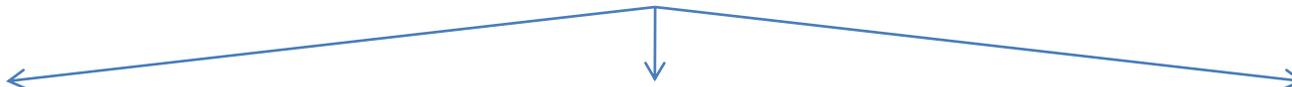


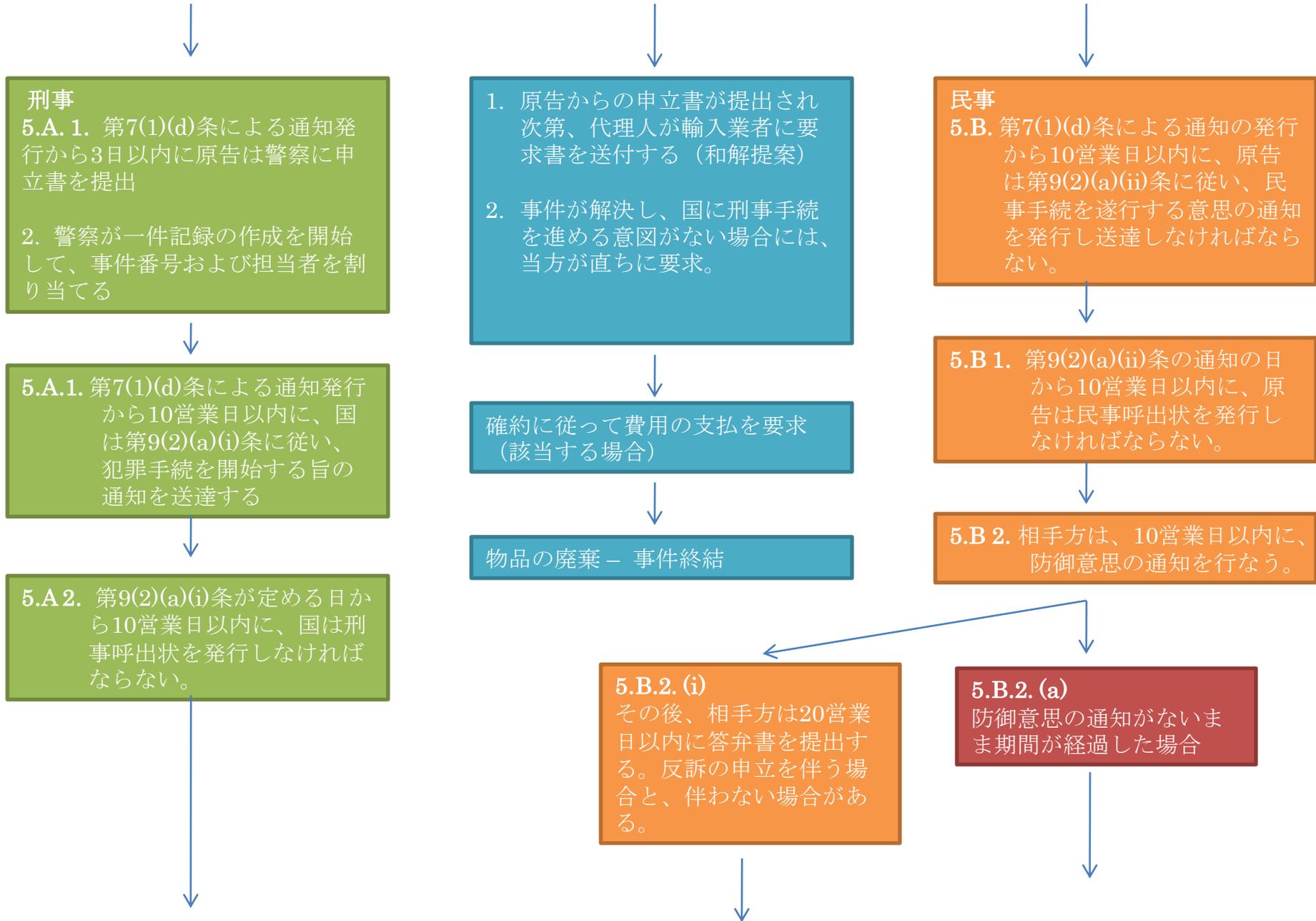
4. a) 税関/警察が捜索・差押令状を取得

b) 令状の執行（正式差押）

c) 物品を模倣品保管所へ移送

d) 第7(1)(d)条による通知





↓

5.A. 3. 1. 原告代理人は模倣品保管所からサンプルを抽出しなければならない。

2. 公判に先立って、国の検察官に分析報告書を提出しなければならない。

↓

5.A.4. 公判開催日

↓

5.A.5. 結果により:
返却 / 廃棄処分
税関/警察に、廃棄した旨を証拠を添えて通知

↓

5.B.2. (ii)
反訴(15日)

↓

5.B.2. (iii)
追加要求明細書提出 (裁判開始の20日前までに)

↓

5.B.2. (iv)
要求明細書への回答 (要求を受け取ってから10日以内)

↓

5.B.2. (v)
裁判期日の申請と裁判

↓

5.B.2. (b)
欠席裁判の申請

↓

5.B.2. (c)
物品の廃棄処分
税関/警察に、廃棄した旨を証拠を添えて通知

委任状

この委任状により、登記上の事務所を_____ (住所を記入) に置く_____ (会社名を記入) (以下「会社」という) は、_____ (代理人名及び住所を記入) のパートナー (以下「代理人」という) を、南アフリカでの会社の真正かつ適法な代理人とし、会社の名前で、会社のために、下記に記載する事項に関するすべての行為および事項を行いまたは実施する完全な権能および権限を付与する。会社を代理して、「1997 年法律第 37 号模倣品法」に基づき南アフリカ国税庁税関局(SARS)に対して被疑模倣品の差押および押収の申立を行なうこと、模倣品の輸入業者に対する民事および/または刑事の手続を開始すること、南アフリカ警察庁および/または貿易産業省に対して模倣品に関する刑事または民事の申立を行なうこと、さらに、本文書により代理人として特に授權されていない行為または事項のうち前記の目的または事項に関連して適切または望ましいと代理人が判断したこと全般。

会社は、本証書の作成にあたり代理人が行なう行為または他に行わせる行為に同意許可する。この委任状は、すべての事項に関して、南アフリカ共和国法に準拠し、同国法に従って解釈されるものとする。

署名地.....(場所)

日付：20.....年.....月.....日

(署名および役職)
(署名者のフルネーム)

自己が署名権限を有することをここに証明する。

立会人:

1. _____ 2. _____

補償念書

当社_____ (会社名を記入) は、「関税および間接税に関する法」による差押および/または押収、または「模倣品法」による差押および/または押収、並びに、「1997年模倣品法」、「1964年関税および間接税に関する法」を含む法律による物品に対する下記の措置または引渡に関して南アフリカ国税庁またはその職員に生じた責任を補償することを確約し、さらに、必要に応じて、物品の差押および/または押収にかかわる経費を負担し、物品の差押および/または押収により南アフリカ国税庁長官に生じる法的費用を支払い、当該物品の保管所までの輸送の支払および手配を行い、南アフリカ国税庁長官が定める国の倉庫の賃料を含めた保管料を支払い、物品の廃棄の手配および支払を行なうことを確約する。

署名地.....(場所)

日付：20.....年.....月.....日

(署名および役職)
(署名者のフルネーム)

自己が署名権限を有することをここに証明する。

立会人:

1. _____ 2. _____

(補償の文言の変更あるいは修正を禁止する)