
CHAMBERS GLOBAL PRACTICE GUIDES

Trade Marks & Copyright 2026

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**South Africa: Law and Practice
& Trends and Developments**

Daniel Pekar, André du Plessis,
Sarah Suleman and Shaawn Phooko
KISCH IP



SOUTH AFRICA



Law and Practice

Contributed by:

Daniel Pekar, André du Plessis, Sarah Suleman and Shaawn Phooko
KISCH IP

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KISCH IP has been a leader in IP and commercial matters in South Africa and Africa for more than 150 years. KISCH-IP's skilled partners, dedicated support staff and network of agents across Africa enable the firm to navigate various IP requirements across the continent. The firm has offices in South Africa and Jersey in the Channel Islands, and also has a growing tax advisory team. The trade mark department provides a full range of trade mark-related services in South Africa and internationally. This encompasses trade mark prosecution services at all stages, includ-

ing searches, filings, compliance, publication, registrations, recordals and amendments, assignments, licences and renewals. KISCH-IP also provides trade mark enforcement at all stages, including infringements, passing-off claims, ambush marketing, unlawful competition, company name objections, domain name disputes and consumer/advertising-related matters. In terms of copyright, the team provides advice on how and when copyright subsists, and how best to protect and enforce copyright to control the commercial exploitation of these rights.

Authors



Daniel Pekar is a senior associate at KISCH IP in the trade mark prosecution department. His focus is on South African and international trade mark portfolio management, advising clients across various

industries with a wide array of prosecution and maintenance services. Daniel also advises clients in respect of compliance and enforcement of labelling regulations, copyright issues and several forms of intellectual property dispute resolution. Daniel frequently shares his knowledge on artificial intelligence as it relates to intellectual property, and his articles on labelling are regularly published.



André du Plessis is a trade mark attorney and director at KISCH IP. He holds B.Com Law and LLB degrees from the University of Pretoria and was admitted as an attorney in 2009, becoming a fellow of the South

African Institute of Intellectual Property Law in 2015. André practises in the trade mark prosecution department of KISCH IP and specialises in trade mark availability and registrability searches, trade mark filing strategies, trade mark portfolio management and trade mark assignment advice for local and international clients. He also has experience in the drafting of commercial agreements relating to IP, including software development and trade mark licensing agreements.



Sarah Suleman is an associate in KISCH IP's trade mark department, where her primary priorities concern trade mark litigation matters such as company name objections, domain name disputes, oppositions

throughout Africa, and trade mark and copyright infringement proceedings. Sarah also has an understanding of trade mark filings and prosecution, including reporting official actions and filing submissions. Her focus areas extend to preparing quotations, administration of trade mark portfolios, assisting with portfolio takeovers and change of address for service, conducting audits, conducting trade mark availability and registrability searches, drafting deeds of assignment, preparing letters of consent, and facilitating approaches and drafting-related undertakings. Sarah has an LLB from the University of KwaZulu-Natal.



Shaawn Phooko is a senior associate in KISCH IP's trade mark department who holds an LLB degree and an LLM in IP from the University of Johannesburg. Her focus ranges from trade mark prosecution – specifically, trade mark searching – to litigation focusing on trade mark infringements, unlawful competition and copyright litigation throughout Africa. Shaawn's knowledge extends to copyright advice and registration, advising clients on various aspects of copyrights, including ownership and licensing. She has worked for a South African government entity on copyright-related agreements that dealt with the regulation of copyright rights and associated obligations on employees. Shaawn's additional expertise includes advertising disputes and compliance, domain name disputes and company name objections.

KISCH IP

5 Inanda Greens Business Park
54 Wierda Road West
Wierda Valley
Sandton
Johannesburg 2146
South Africa

Tel: +27 11 324 3000
Fax: +27 86 603 6118
Email: info@kisch-ip.com
Web: www.kisch-ip.com



1. Trade Mark and Copyright Law

1.1 Governing Law

Trade marks and copyright are governed by statute – namely, the Trade Marks Act 194 of 1993 and the Copyright Act 98 of 1978.

Common law trade marks are recognised. An individual/entity obtains common law rights by virtue of their/its use of a mark in trade.

1.2 Conventions and Treaties/Rights of Foreign IP Holders

South Africa is a member state of the Paris Convention and the Berne Convention, as well as a signatory to the Nice Agreement, the Trade Mark Law Treaty 1994 and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement – all of which are self-executing. The Paris Convention and the Berne Convention govern the rights of foreign trade mark and copyright holders in South Africa.

2. Trade Mark Ownership, Protection and Rights

2.1 Types of Trade Marks

The Trade Marks Act 194 of 1993 broadly defines what qualifies as a “mark”, which includes a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour, or container for goods (or any combination of the aforementioned). The overarching principle is that the subject mark must be capable of being represented graphically. As such, it is clear that there are a number of different types of trade marks in South Africa.

Colours, three-dimensional shapes and configurations, sounds and motion trade marks are all registrable, provided that they are distinctive and capable of graphic representation.

South Africa follows the Nice Classification and it is thus possible to secure protection for service marks.

It is also possible to secure protection for “device” marks. This includes any visual representation of a design, container, shape or colour. Securing protec-

tion for trade dress, product design and packaging is largely the same. A trade mark application for the aforementioned types of marks will typically exclude the name of the product and any descriptive matter so as to ensure design elements incorporated on the product packaging/design or trade dress are protected.

The Trade Marks Act 194 of 1993 makes provisions both for certification marks and collective marks. The standard rules and principles relating to distinctiveness and graphic representation applicable to ordinary trade marks apply to certification and collective marks. However, there are additional rules applicable to these trade marks, as follows.

- Certification marks – the applicant may not offer the goods/services covered by the certification mark. The applicant must submit a set of rules governing the use of the mark and a sworn statement that it does not offer the goods/services covered by the certification mark.
- Collective marks – the applicant may offer the goods/services covered by the trade mark applications. The applicant must submit a set of rules governing the use of the mark. Notably, geographical names or other indicators of geographical origin may be registered as collective trade marks.

Any mark that may serve in trade to indicate geographical origin cannot be registered as a trade mark. Therefore, as a general rule, geographic indicators cannot be registered as trade marks unless it is a collective mark or the geographical location has no association with the goods/services covered by the trade mark.

A surname can be registered as a trade mark in South Africa, provided it is distinctive in relation to the subject goods/services.

In order to qualify for trade mark protection, a mark must distinguish the goods/services in relation to which it is used from the same type of goods/services offered by a third party. As industrial designs typically detail/outline the function of a product, they cannot be protected as trade marks as they do not serve as a source identifier.

Trade Marks Protected by Statute

In terms of the Merchandise Marks Act 17 of 1941, certain trade marks are considered to be prohibited marks – the use of which is either absolutely or conditionally prohibited. There is a non-exhaustive list of trade marks that fall within this category, which include the current and former national flag of the Republic of South Africa.

Furthermore, the Merchandise Marks Act 17 of 1941 affords the Minister of Trade, Industry and Competition the power to designate an event as a “protected event”. The effect thereof is that for the duration of that event no one may use a trade mark related to the event (eg, the 2010 football World Cup).

Section 35 of the Trade Marks Act 194 of 1993 protects well-known/famous trade marks that are not in use or registered in South Africa, provided that the proprietor of the mark is a national of or domiciled in a Paris Convention country.

2.2 Essential Elements of Trade Mark Protection

In order to qualify for trade mark protection, a mark must be distinctive in that it is capable of distinguishing the goods/services of a person in respect of which it is registered/proposed to be registered from the goods/services of another person as provided for in Section 9 of the Trade Marks Act 194 of 1993. The trade mark must be capable of the distinguishing function at the date of application for registration by being inherently capable of doing so or the trade mark must be capable of the distinguishing function by reason of prior use.

Trade marks relying on prior use for their distinguishing function need to provide evidence of acquired distinctiveness. This is done through – inter alia – evidence of prior use, which should include turnover figures and advertising spend during the period of use.

2.3 Trade Mark Rights

The proprietor of a registered trade mark obtains a prima facie statutory right to the exclusive use of a given trade mark. The proprietor’s rights are outlined by the Trade Marks Act 194 of 1993 and persist throughout the term of a given mark.

2.4 Use in Commerce

In South Africa, proof of use in respect of a trade mark is not required for filing purposes. That said, once a trade mark has proceeded to registration, it may become vulnerable to expungement on the basis that the proprietor had no bona fide intention to use the mark or if there has been no use for a period of five years from the date of registration.

The proprietor is merely required to prove that there has been bona fide use of a trade mark. The main consideration is that the use of the mark by the proprietor is to further its trade as opposed to frustrating the trade of others. In this regard, it is imperative that the use relied on is trade mark use and not descriptive use.

2.5 Notices and Symbols

There are two symbols that are used with trade marks – namely, TM (in superscript) and ®. The owner of a mark may use the superscript TM symbol as soon as the trade mark is being used in trade and as a trade mark. Importantly, the ® symbol may only be used once the trade mark has proceeded to final registration. Using the ® symbol before the trade mark has proceeded to registration amounts to a criminal offence in terms of Section 62 of the Trade Marks Act 194 of 1993.

There are no consequences for not providing notice of trade mark ownership. However, it is advisable to always use the superscript TM symbol or ®, as these serve as a deterrent to potential infringers.

2.6 Related Rights

In the case of a device mark, there may be an overlap between trade mark law and copyright law as well as design law. Copyright vests in the artistic work in the case of a logo and there may be an aesthetic or functional design for a particular article. By way of example, in the case of a unique bottle with a logo on it that has a particular function as a result of its shape, a trade mark application can be filed for the shape of the bottle, copyright may vest in the logo, and a functional design can be filed for the unique shape of the bottle.

If a surname is registered as a trade mark, the surname is protected as a source identifier in relation to the given goods/services. The trade marks registry will, however, require a so-called surname endorsement so that a person with the surname will not be debarred from the bona fide use of the surname in the course of trade. Moral rights in a copyright context will protect the author of a work's right to integrity and paternity. As such, the respective rights simply co-exist.

There are no limitations on the scope of trade mark laws in view of the related rights that may exist in a single trade mark. Each form of IP ultimately co-exists as a bundle of separate rights vested in the same device/article.

3. Copyright Ownership, Protection and Rights

3.1 Types of Copyrightable Works

In South Africa, there are nine types of works that are eligible for copyright protection – namely, literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs. The aforementioned works are provided for in Section 1 of the Copyright Act 98 of 1978.

Copyright Protection and Industrial Designs

An industrial design is an artistic work and will qualify for copyright protection, provided the requirements for the subsistence of copyright have been met. It is important to note that copyright will vest in the industrial design and may not extend to the actual product that is developed from the design if it falls within the “reverse engineering” exception. In this regard, in terms of Section 15 (3A) of the Copyright Act 98 of 1978, protection will not extend to the reproduction of a three-dimensional article that has been made available to the public, is of a utilitarian nature, and is multiplied by industrial process.

3.2 Essential Elements of Copyright Protection

In order to qualify for copyright protection, a work (as defined in the Copyright Act 98 of 1978) must meet the following criteria:

- It must be original in that it is a product of one's own efforts and should not have been copied from another work.
- The work must be reduced to material form, as copyright does not subsist in an idea/concept.
- The author is a qualified person or the work was first published in a Berne Convention country. A “qualified person” is a South African citizen or someone who is domiciled in South Africa or, in the case of a juristic person, an entity that is incorporated in South Africa.

3.3 Copyright Authorship

The term “author” is defined in the Copyright Act 98 of 1978 in relation to the type of work:

- literary, musical or artistic works – the person who first makes or creates the work;
- photographs – the person who is responsible for the composition of the photograph;
- sound recordings – the person by whom the arrangements for the making of the sound recording were made;
- cinematograph films – the person by whom the arrangements for the making of the film were made;
- broadcasts – the first broadcaster thereof;
- programme-carrying signals – the first person emitting the signal to a satellite;
- published editions – the publisher of the edition;
- literary, dramatic, musical or artistic work or computer program that is computer-generated – the person who made the necessary arrangements for the creation of the work to be undertaken; and
- computer program – the person who exercised control over the making of the computer program.

Commissioned Works and Works Made in the Course of Employment

As a general rule, the author is the owner of the copyright in a work. However, in the case of commissioned

works, there are exceptions to this general rule, as outlined in Section 21 of the Copyright Act 98 of 1978:

- Literary and artistic works made in the course of employment at a newspaper/magazine/similar periodical for purposes of being published in the newspaper/magazine – the proprietor of the newspaper/magazine/similar periodical is the owner of the copyright in so far as it relates to the publication of the work or to reproduction of the work for it to be published. Notably, the author remains the owner of the copyright in the work in all other respects (ie, using the work in a film).
- Where a person commissions another to take a photograph, paint/draw a portrait, make a gravure or make a cinematograph film, audiovisual work or sound recording and pays/agrees to pay for the work – the person paying for the work is the owner of the copyright therein.
- Works made in the course and scope of employment (not falling within the above-mentioned categories) – the employer will be the owner of the copyright in the work, provided there was a contract of service in place. This exception does not apply to freelance workers.

Copyright in Works Created by AI

A work created by AI qualifies as a computer-generated work. By way of example, an image generated through an AI platform will be a computer-generated artistic work. As mentioned earlier, the Copyright Act 98 of 1978 provides that the author of a computer-generated work is the person who made arrangements for the creation of the work. On this basis, it may be argued that the person who entered the prompt on an AI platform made the necessary arrangements for the creation of the work and is therefore the author of the work. At this point in time, there is no certainty on this aspect and the aforementioned argument is merely speculative – given that this aspect has not been tested in any South African court.

Joint Authorship

The Copyright Act 98 of 1978 makes provision for joint authorship, which arises when a work is produced through the collaboration between two or more authors in which the contribution of each author cannot be separated from the contribution(s) of the other.

Determining whether two or more persons are joint authors of a work is done on a case-by-case basis. The main consideration is whether there has been collaboration between the authors from the outset whereby their contributions are directed towards the creation of one inseparable work.

On the assumption that the joint authors are also the joint owners of the copyright in a work, their rights are as follows:

- Exploiting the copyright – a co-owner of copyright in a work may not use or exploit the rights comprised in their copyright without the consent of the other co-owner.
- Enforcing the copyright – each co-owner may enforce the copyright against third parties without the consent/co-operation of the other co-owner.

Joint authors own an equal percentage of the work.

3.4 Copyright Rights

Owning the copyright in a work affords the owner exclusive rights in relation to the given work. These exclusive rights are referred to as “restricted acts” and are determined in reference to the type of work. Broadly speaking, these acts include the right to reproduce the work and make an adaptation of the work the author of the work. These rights are the “right of integrity” and the “right of paternity”. The moral rights are applicable to literary, musical or artistic works, cinematograph films and computer programs. The scope of these rights is as follows:

- Right of integrity – this entitles the author to object to any distortion, mutilation or other modification of the work where such action would be prejudicial to their honour or reputation.
- Right of paternity – this allows the author to claim authorship of their work and ensure that they are acknowledged as the author of a work.

3.5 Term of Protection and Termination

The term of copyright protection applicable is determined with reference to the type of work at issue. The general term of protection for the respective works is as follows:

- literary, musical and artistic works – the lifetime of the author and 50 years from the end of the year in which the author dies;
- cinematograph films, photographs and computer programs – 50 years from the end of the year in which the work is made available to the public with consent of the owner of the copyright or is first published, whichever term is longer;
- sound recordings – 50 years from the end of the year in which the recording is first published;
- broadcasts – 50 years from the end of the year in which the broadcast first takes place;
- programme-carrying signals – 50 years from the end of the year in which the signals are emitted to a satellite; and
- published editions – 50 years from the end of the year in which the edition is first published.

The rights of a copyright owner are terminated once the term of protection expires. The work then falls into the public domain.

3.6 Collective Rights Management Systems

In South Africa, the following collective rights management systems are in place: the Dramatic, Artistic and Literary Rights Organisation (DALRO), the South African Music Performance Rights Association (SAM-PRA), the South African Music Rights Organisation (SAMRO), the Independent Music Rights Association (IMPRA), the Composers, Authors and Publishers Association (CAPASSO), the Association of Independent Record Companies of South Africa (AIRCO), the Recordings Industry of South Africa (RISA) Audio-Visual (“RISA Audio Visual”, or RAV), the Motion Picture Licensing Company (MPLC) and the Christian Copyright Licensing International (CCLI).

Collective management systems are governed by the following statutes: the Copyright Act 98 of 1978, the Performers’ Protection Act 11 of 1967, the Companies Act 71 of 2008, and the Regulations on the Establishment of Collecting Societies in the Music Industry GN 517 in GG 28894 of 1 June 2006.

The role of collective rights management systems is to collect royalties and distribute them to copyright owners, manage copyright licences on behalf of the

copyright owners, and enforce the rights of the copyright owners against infringers.

3.7 Copyright Registration

Copyright in a work subsists automatically without the need to register it, provided that the requirements for subsistence of copyright referred to in **3.2 Essential Elements of Copyright Protection** have been met.

The only type of work that can be registered in South Africa is a cinematograph film. It is not necessary to register the copyright in a cinematograph film – although it is beneficial, as it makes it easier for a claimant to prove subsistence of copyright should the need arise. Once registered, the copyright owner receives a certificate from the Registrar that serves as prima facie proof of the details contained on the register. The register is publicly available.

Any person who claims to be the owner of the copyright in a cinematograph film as per the provisions of the Copyright Act 98 of 1978 may apply to register the copyright in their film. Foreign applicants must appoint a South African attorney to file the application and be recorded as the address for service on the register.

In South Africa, the copyright symbol is added to a work along with a copyright notice, which will incorporate the following elements: the word “Copyright” or the © symbol, the year in which the work was created, and the name of the owner of the copyright.

3.8 Copyright Application Requirements

In filing an application to register a cinematograph film, the applicant/authorised agent lodges an application to the Registrar, who will note the date of lodgment. This becomes the effective date of registration of the film.

The Registrar will examine the application and, if they are satisfied that the prescribed requirements have been met and that the applicant is the copyright owner, they will accept the application. The application is then advertised for one month in the Patent Journal for opposition purposes. Following the one-month period, the application proceeds to registration.

The most important document accompanying the application is the Statement of Case. This must be verified under oath, as it outlines all the facts pertaining to the copyright in the film, such as:

- name of the film;
- name, citizenship, and country of domicile of the author;
- circumstances outlining that the applicant is in fact the author of the film;
- date and place at which the film was made;
- whether the film has been made available to the public and, if so, the date that this occurred;
- whether the film has been published and, if so, the place and date that this occurred;
- a brief description of the subject matter of the film;
- names of the director and producer of the film;
- name of the narrator or main character of the film; and
- any trade marks used in relation to or on the film or any other features that distinguish it from other films.

The official fee to register the copyright in a cinematograph film is ZAR510 (roughly USD32), but the professional fees will differ depending on the firm that assists with such an application.

3.9 Refusal of Registration

The Registrar may refuse the application if any of the prescribed requirements and information referred to in 3.8 Copyright Application Requirements have not been met/provided. Furthermore, if the Registrar is of the view that copyright does not vest in the film, they may also refuse the application.

The applicant will be notified of the Registrar's decision to refuse the application – following which, the applicant has a period of three months to challenge the refusal by submitting written arguments to the Registrar. Any incorrect information/clerical errors may be corrected on application by the applicant to the registry.

3.10 Related Rights

Copyright and trade mark rights co-exist and are complementary to each other. By way of example, copyright will vest in a logo (provided the requirements for

subsistence are met) and a trade mark application can be filed for that same logo.

The scope of copyright law is not limited based on trade mark rights.

4. Trade Mark Registrations and Applications

4.1 Trade Mark Registration

Strictly speaking, it is not necessary to obtain a trade mark registration in order to have trade mark rights. The owner of the trade mark will acquire common law rights in and to the mark by using it in the course of trade. By registering a trade mark, the owner of the mark obtains a prima facie statutory right in and to the mark and the registration certificate serves as proof thereof.

There are not any separate standards for registering different types of trade marks. The overarching requirement is that the trade mark must be distinctive, as outlined in 2.2 Essential Elements of Trade Mark Protection.

4.2 Trade Mark Register

There is a single trade mark register in South Africa and it is publicly available. The register is administered by the Companies and Intellectual Property Commission (CIPC).

It is standard practice to conduct an availability search prior to filing a trade mark application. That said, the search is not a technical requirement to file a trade mark application. It is merely a risk mitigation strategy and is not compulsory, as an applicant may elect to file a trade mark application directly (without conducting an availability search). The primary database that is searched is the Trade Marks Register – although searches typically include “secondary sources” such as the Domain Names Register and the Company Names Register. Furthermore, general online searches on search engines and social media pages are also conducted, given that a third party may be using the same or similar trade mark (without registering it).

4.3 Term of Registration

A trade mark is valid for a period of ten years from the date of application.

Trade mark registrations may be renewed every ten years. The renewal procedure is as follows:

- No less than six months prior to the expiration of the trade mark, the Registrar will send the proprietor of the mark a notice that includes the date of expiration and the conditions as to payment of fees upon which the renewal may be obtained.
- The proprietor must submit the application to renew the trade mark registration within the period commencing six months prior to the expiration of the mark and ending six months after said expiration. If the renewal fee has not been paid within this period, the Registrar will advertise this fact in the Patent Journal for one month. If the renewal fee is not paid within this one-month period, the trade mark will be removed from the register as of the date of the last registration.
- There are no specific requirements for the renewal of the trade mark. If the renewal application is done within the specified time periods, the mark will be renewed (even if it is not being used in trade).

In the event that a trade mark is removed from the register, it may be restored. Notably, it is not a guarantee that the restoration will be successful, as certain requirements must be met – namely, no conflicting trade marks must have been filed in the interim and the proprietor must have had no intention to allow the mark to lapse. The Registrar considers the restoration application and has full discretion over whether the mark is to be restored or not.

4.4 Application Requirements

Any individual/legal entity may submit a trade mark application, provided that the address for service is in South Africa. The applicant may only be represented by themselves if such applicant is a South African individual or entity or an authorised representative (ie, a practising attorney). Foreign entities that file applications in South Africa are duly represented by an authorised representative in South Africa, who will be registered as the address for service.

Multi-class trade mark applications are not permitted in South Africa, as it is a single-class jurisdiction.

For ordinary trade mark applications (ie, word marks and devices), the applicant merely needs to provide its name and address, the address for service, a specification covering the goods/services relevant to the mark, and a depiction of the mark (in the case of a device). However, for certification and collective trade marks, the applicant is required to submit additional documentation, as follows:

- certification trade mark – a sworn statement confirming that the applicant does not trade in the goods/services covered by the application, along with a set of rules governing the use of the mark; and
- collective trade mark – the rules governing the use of the mark.

The official fee to file a trade mark application is ZAR590 (roughly USD37).

4.5 Use in Commerce Prior to Registration

In South Africa, a trade mark application may be filed before it has been used in trade. Prior use is not a requirement for filing a trade mark application.

4.6 Consideration of Prior Rights in Registration

Upon examination of the trade mark, the Trade Marks Office will consider prior rights of third parties that may pose a bar to the registration of the new application. However, the prior rights considered are limited to trade marks that appear on the register; the Trade Marks Office will not consider common law rights that third parties may have.

4.7 Revocation, Change, Amendment or Correction of an Application

After filing a trade mark application, it is possible to withdraw the application, correct any clerical errors, or make amendments to the application. In order to make any amendments after filing, an application is filed with the Trade Marks Office outlining the specific request, which is attended to by the relevant person at the Trade Marks Office upon receipt of the application.

A trade mark may be amended after the trade mark application has been filed. Trade mark applications that have not proceeded to registration can be amended in any way the proprietor deems appropriate. Amendments to a registered trade mark are possible in circumstances where the change does not substantially alter the material identity of the trade mark or broaden the proprietor's rights in any way.

4.8 Dividing a Trade Mark Application

It is not possible to divide a trade mark application in South Africa.

4.9 Incorrect Information in an Application

Providing incorrect information with regard to a trade mark application may result in the trade mark being provisionally refused upon examination. Should the mark proceed to registration, it might render it vulnerable to cancellation depending on the nature of the incorrect information.

It is possible to correct any errors relating to the trade mark application, as outlined in **4.7 Revocation, Change, Amendment or Correction of an Application**.

4.10 Refusal of Registration

Upon examination of a trade mark, the Registrar may refuse it based on any of the following absolute grounds for refusal, which are provided for in Section 10 of the Trade Marks Act 194 of 1993:

- the mark does not constitute a trade mark as defined in the Trade Marks Act 194 of 1993;
- the trade mark is not capable of distinguishing;
- the trade mark is descriptive of the goods/services in relation to which it has been filed and would therefore be reasonably required for use in trade;
- the trade mark consists of a sign that has become customary in current language or established practices of the trade;
- the applicant has no bona fide claim to proprietorship in respect of the trade mark;
- the applicant has no bona fide intention to use the mark as a trade mark;
- a trade mark that consists of a shape, configuration or colour of goods where such shape, configuration or colour is required to achieve a technical

result, results from the nature of the goods, or is likely to limit the development of any art of industry;

- a mark for which the application for registration was made mala fide;
- a mark that contains the coat of arms, seal or national flag of South Africa or of a Paris Convention country;
- a mark that contains any word, letter or device indicating State patronage;
- a mark that contains any mark specified in the regulations as being a prohibited mark (eg, marks that include the ® symbol); and
- a mark that is inherently deceptive or its use would be likely to cause deception or confusion, or be contrary to law, contra bonos mores or likely to give offence to any class of persons.

If a trade mark application is provisionally refused by the Registrar on absolute or relative grounds, it can be challenged in view of overcoming the refusal. This is done by submitting written representations to the Trade Marks Office. The content of the written representations will vary depending on the grounds upon which the trade mark application was refused – for instance, a refusal based on the fact that the trade mark is not capable of distinguishing can be overcome by submitting proof that the mark has acquired distinctiveness through use.

4.11 The Madrid System

It is not possible to file international registrations in South Africa, as it is not a signatory to the Madrid Agreement nor to the Madrid Protocol.

5. Trade Mark Procedure for Inter Partes Proceedings

5.1 Timeframes for Filing an Opposition or Cancellation

Shortly after an application has been accepted by the Registrar, it is advertised in the Patent Journal for a period of three months, during which any interested third party may oppose the mark.

Any person seeking to oppose a trade mark application may ask the Registrar in writing (before the

expiry of the advertisement period) not to issue the registration certificate for a further period of three months. This first extension is automatic and will be given if requested by any third party. This affords the opponent an extension of time to file the opposition. The applicant and the opponent cannot enter into a cooling-off period in view of reaching an amicable resolution; however, they may agree on an extension of the opposition period to allow for negotiations to take place. The parties can agree on any further three-month extensions as appropriate or agreed between the parties.

As cancellation/revocation applications occur after the trade mark has proceeded to final registration, there is no time limit within which to file either of these actions. With regard to cancellation proceedings on the basis of non-use, there are time periods provided for in Section 27 of the Trade Marks Act 194 of 1993, as follows:

- A mark registered without bona fide intention of being used – there must be no bona fide commercial use of the trade mark up until three months before the date of the cancellation application.
- No use of a trade mark registration – there must be no bona fide commercial use of the trade mark for a continuous period of five years from the date upon which the registration certificate was issued up until three months before the date of the cancellation application.
- Trade marks registered in the name of a body corporate or a natural person who has died – the body corporate must have been dissolved or the natural person must have died not less than two years prior to the date of application for cancellation and no application for the assignment of the trade mark has been made by a third party.

In the case of cancellation applications based on non-use, the arguments/evidence of non-use may only be filed once the above-mentioned time periods have lapsed.

5.2 Legal Grounds for Filing an Opposition or Cancellation

Grounds to File an Opposition

The legal grounds for filing an opposition can be split into the following four categories:

- lack of inherent registrability;
- prohibited marks;
- proprietorship and good faith; and
- third-party rights.

The first three categories are discussed in **4.10 Refusal of Registration** with regard to the absolute grounds of refusal; these grounds apply equally in context of opposition proceedings. The fourth category (third-party rights) includes the following grounds – namely, that the trade mark applied for is similar to:

- a registered trade mark;
- a trade mark that is the subject of an earlier trade mark application;
- a trade mark that is not registered but has been used in trade by a third party;
- a well-known international trade mark (regardless of whether it is registered in South Africa or not); and
- a trade mark that is filed after the subject mark but to which the applicant has prior rights.

Grounds to File for Cancellation

Broadly speaking, trade mark registration can be cancelled/expunged on three grounds:

- on the basis that the trade mark registration is an entry wrongly made/wrongly remaining on the register;
- on the basis that the proprietor or licensee has failed to comply with a condition entered on the register in relation to the trade mark registration; and
- on the basis of non-use of the trade mark.

The non-use provisions have been discussed in **5.1 Timeframes for Filing an Opposition or Cancellation**.

Section 24 of the Trade Marks Act 194 of 1993 provides for cancellation on the basis that a given trade mark is an entry wrongly made or wrongly remaining

on the register. This provision must be read with Section 10 of the Trade Marks Act 194 of 1993 discussed in **4.10 Refusal of Registration**. Entries “wrongly made” typically refer to a trade mark that proceeded to registration despite offending against one of the provisions in Section 10. Entries “wrongly remaining” refer to trade marks that were registrable at the time of filing but have since become generic/non-distinctive and no longer qualify for trade mark protection.

If an interested party is successful in cancellation/expungement proceedings, the subject trade mark will be removed from the register.

Expungement/Opposition Proceedings and Re-Examination

In context of expungement and opposition proceedings, there is no re-examination procedure available. If the opponent is successful in opposing/cancelling the trade mark, it will be prevented from proceeding to registration and withdrawn (opposition) or removed from the register (expungement/cancellation).

5.3 Ability to File an Opposition or Revocation/Cancellation

In terms of Sections 21, 24, 26 and 27 of the Trade Marks Act 194 of 1993, “any interested person” may file an opposition or initiate cancellation proceedings. It is not a prerequisite for the opponent to have a trade mark application/registration. The opponent is not required to have legal representation and can file the opposition or initiate the cancellation proceedings on their own behalf.

The official fees charged by the Trade Marks Office are set according to the published official fees. These fees vary depending on the office action, but will be in line with the published schedule. Professional fees will depend on the firm that is dealing with the specific office action and vary from firm to firm. Unfortunately, there is no fee schedule for professional fees to deal with any office action.

The main admissibility requirement for cancellation proceedings is that the person initiating the proceedings is an “interested person”, which South African courts have interpreted broadly to include:

- a person who has a trade mark application that is being prevented from proceeding to registration owing to the registered trade mark;
- a person with a genuine intention to trade; and
- a competitor whose field of business is narrowed owing to the registered trade mark.

Furthermore, the basis of the cancellation application should fall within one of the categories outlined in **5.2 Legal Grounds for Filing an Opposition or Cancellation**.

5.4 Opposition or Revocation/Cancellation Procedure

The opposition/cancellation procedure is provided for in Regulation 19 of the Trade Mark Regulations and is as follows:

- An opposition/cancellation must be brought on notice of opposition/cancellation supported by an affidavit outlining the facts upon which the applicant relies for relief.
- A copy of the notice and all accompanying annexures is served on every interested party.
- The notice will include the applicant’s address for service at which they will accept notice and service of all documents in the proceedings. This notice will set forth a day not less than one month after service of it on the respondent, on which the respondent is required to notify the applicant and the Registrar whether the respondent intends to defend the application.
- If the respondent does not notify the applicant of the respondent’s intention to defend the application, it will be set down for hearing on a date not less than ten days after expiry of the above-mentioned one-month period.
- If the respondent notifies the applicant of their intention to defend the application, the respondent must submit their answering affidavit to the applicant within two months of the notification of their intention to defend.
- The applicant must then submit their replying affidavit within one month of receiving the respondent’s answering affidavit.
- The matter is then set down for hearing before the Registrar.

(Note: The Registrar is entitled to refer any opposition to the High Court to be heard and it has become customary for trade mark opposition to be referred to the High Court for hearing. The High Court's rules, regulations and practice directive will become applicable once the opposition has been referred to the High Court for hearing.)

Oppositions are resolved through motion proceedings.

Cancellation/revocation proceedings may be brought before the Registrar or before a civil court.

It is possible to partially cancel a trade mark registration. This occurs where a registered trade mark has been used in relation to some of the goods/services covered in the specification but not in relation to others – in such an instance, only the goods/services in relation to which the mark is not being used will be removed from the specification.

5.5 Legal Remedies Against the Decision of the Trade Mark Office

Any person who is aggrieved by a decision or order of the Registrar may appeal to the Gauteng Division of the High Court, Pretoria for relief. This court will have the power to consider the merits of the given matter, to receive further evidence and to make any order it deems fit. If the appeal is by a party to opposition proceedings, no further evidence may be submitted to the court, as it is merely a rehearing on the merits limited to the evidence/information upon which the Registrar's decision was made.

In appealing against a decision of the Registrar, no leave to appeal is necessary, the appeal must be noted within three months of the date of the decision/order by the Registrar, and the appeal must be prosecuted within six weeks from the date on which it was noted.

5.6 Amendment in Revocation/Cancellation Proceedings

Trade mark revocation/cancellation proceedings are based on the state of the register at the time at which the proceedings were instituted. However, the trade

mark may be amended should the parties reach an agreement to that effect during proceedings.

5.7 Combining Revocation/Cancellation and Infringement

In the event that there are actions for revocation/cancellation as well as for trade mark infringement, the revocation/cancellation application will be heard first. The infringement application will be stayed pending the outcome of the revocation/cancellation application.

5.8 Measures to Address Fraud

There are no special procedures to revoke/cancel trade marks that were filed fraudulently. Should a mark be filed fraudulently, an interested third party may seek to oppose it once it is advertised in the Patent Journal.

Alternatively, should the mark proceed to registration, an interested party may initiate cancellation proceedings on the basis that it is an entry wrongly made and wrongly remaining on the register. For both the opposition and cancellation proceedings, the underlying basis for the applications will be that the applicant/proprietor has no bona fide claim to proprietorship in respect of the mark.

6. Assignments and Licensing

6.1 Assignment Requirements and Restrictions

Both copyright in a work and trade marks can be assigned. The requirements for the assignment of these works are as follows:

- Copyright – a written deed of assignment must be entered into and signed by the assignor and the assignee. This agreement must clearly outline the intention of the assignor to transfer the copyright and the assignee to receive ownership thereof. The agreement must clearly identify the work that is being assigned. It is possible to partially assign copyright in a work – for instance, the owner of the copyright may assign part of their rights to the assignee, thereby providing the assignee the right

to conduct some but not all of the restricted acts in respect of the work.

- Trade marks – a written deed of assignment must be entered into and signed by both the assignor and assignee. This agreement must include an effective date. Both pending applications as well as registered trade marks may be assigned. It is possible to partially assign a trade mark in the sense that the assignor only assigns certain goods/services covered by the trade mark to the assignee. Importantly, a trade mark cannot be assigned if – as a result of the assignment – the use of the trade mark by different persons would give rise to a likelihood of deception or confusion. Moreover, all trade marks that are associated with each other must be assigned together.

Transfer of Copyright and Trade Marks Upon Death

Copyright and trade marks can be transferred to a third party upon death of the owner of the aforementioned IP. This occurs by way of a transmission of rights. The trade marks and copyright form part of the deceased proprietor's estate and, when the assets are transferred to the heirs, the trade marks and copyright will pass to the heirs by operation of law.

6.2 Licensing Requirements or Restrictions

A licence agreement for trade marks and copyright may be spoken, in writing, tacit, or inferred from conduct. The exception to this rule is an exclusive licence granted for copyright, which must be in writing and signed by or on behalf of the licensor under the terms of Section 22 of the Copyright Act 98 of 1978.

Types of Licences

The owner of a trade mark may grant a third party the following types of licences:

- non-exclusive licence – the licensor retains the licensed rights without any restrictions but also provides the licensee with these rights;
- sole licence – the licensor retains the licensed rights with certain restrictions and extends the rights to the licensee; and
- exclusive licence – the licensor is prevented from exercising the licensed rights and the licensee is the only person authorised to exercise the licensed rights.

The duration of the licence is completely up to the licensor and licensee. As such, licences can be perpetual, provided the trade mark or copyright is valid.

Trade mark applications cannot be licensed.

6.3 Registration or Recording of an Assignment or Licence

Trade Marks

An assignment of a trade mark must be recorded on the Trade Marks Register. If not, the trade mark may become vulnerable to expungement, as the person/entity listed as the proprietor of the mark on the register is not the true owner of the mark.

There are no particular risks that arise from the gap between an assignment taking place and its recordal on the register, provided the application to record the assignment has been submitted to the Trade Marks Office.

Licences may be recorded on the register. However, it is not compulsory to do so.

Copyright

In South Africa, there is no copyright register as such, with the exception of the register of copyright in cinematograph films. The assignment or licence of a cinematograph film can be recorded on the register.

It is not compulsory to record the assignment or licence. Failure to do so will not affect the validity of either agreement.

7. Initiating Trade Mark and Copyright Lawsuits

7.1 Timeframes for Filing Infringement Lawsuits

There are no specific timeframes within which a trade mark or copyright infringement action can be instituted.

South African courts have held that the defence of laches does not form part of South African law. However, there are specific defences provided for in the Trade Marks Act 194 of 1993 and the Copyright Act

98 of 1978, which are outlined in **9. Defences and Exceptions to Infringement**.

7.2 Legal Claims for Infringement Lawsuits and Their Standards

Legal Claims for Infringement Lawsuits

Trade marks

The proprietor of a registered trade mark may institute infringement proceedings on the basis that a third party is:

- using the same or similar trade mark in relation to identical goods/services;
- using the same or similar trade mark in relation to similar goods/services; or
- using a similar mark that may result in a dilution of the registered trade mark.

In order to institute trade mark infringement proceedings, the applicant must have a registered trade mark. As such, it is not possible to institute infringement proceedings on the basis of a pending application.

Copyright

A copyright owner may institute infringement proceedings on the following bases:

- another person does/performs one of the restricted acts forming part of the copyright owner's monopoly (ie, reproducing or adapting it) without the copyright owner's permission (direct infringement); and
- a person deals in infringing articles or permits a place of public entertainment to be used for performance of a work that infringes the copyright in a protected work (indirect infringement).

Copyright cannot be registered, with the exception of cinematograph films as discussed in **3.7 Copyright Registration** and **3.8 Copyright Application Requirements**. For infringement proceedings involving a cinematograph film that is registered, the plaintiff will not be required to prove that copyright subsists in that work and it is presumed that the infringer has performed the infringing act without the authority of the copyright owner.

Proving Trade Mark and Copyright Infringement

Trade marks

See the factors discussed in “Legal Claims for Infringement Lawsuits” above, as this outlines what constitutes trade mark infringement. The elements that must be proven to establish infringement are as follows:

- Section 34 (1)(a) and (b) of the Trade Marks Act – the unauthorised use, in the course of trade, of a trade mark that is identical or confusingly similar to a registered trade mark in connection with the same (Section 34 (1)(a)) or similar (Section 34 (1)(b)) goods/services as those covered by the registered trade mark; or
- Section 34 (1)(c) of the Trade Marks Act – the unauthorised use, in the course of trade, in relation to any goods/services of a trade mark that is identical or confusingly similar to a registered trade mark (which is well known in South Africa) in such a way that the use of the mark would take unfair advantage of or be detrimental to the distinctive character or repute of the registered trade mark notwithstanding the absence of deception or confusion.

In addition to the above-mentioned factors, Section 35 of the Trade Marks Act 194 of 1993 makes provision for the infringement of famous trade marks even if they are not registered or used in South Africa, provided that:

- the mark is well known in South Africa;
- the owner of the mark is a national or is domiciled in a Paris Convention country;
- the offending mark is a reproduction, imitation, reproduction or translation of the well-known mark; and
- it is being used in relation to goods/services that are identical/similar to the goods/services and such use is likely to cause deception or confusion.

Copyright

See the discussion in “Legal Claims for Infringement Lawsuits” above, as this outlines what constitutes copyright infringement. The elements that must be proven to establish infringement are as follows:

- Direct infringement – the copyright owner needs to prove that there has been copying of a substantial

part of their work by either reproducing it or making adaptations of that work.

- Indirect infringement – in the case of dealing in infringing copies, the copyright owner must prove that the articles in question are infringing copies in that they are unauthorised reproductions/adaptations of a work in which copyright subsists. Furthermore, the copyright owner must prove that the person committing the indirect infringement had “guilty knowledge” in that they were aware that they are infringing the copyright of another person.

The biggest difference between direct and indirect infringement is the fact that the copyright owner must prove guilty knowledge in the case of indirect infringement.

Alternative Trade Mark Claims

The following alternative claims can be brought by the proprietor of a trade mark:

- Dilution – see discussion in “Proving Trade Mark and Copyright Infringement” above.
- Passing-off – this is a common law claim and requires the applicant to prove that:
 - (a) they have a reputation in respect of the particular mark;
 - (b) there is a misrepresentation by another trader that the goods/services are associated with the applicant; and
 - (c) there is a likelihood that the misrepresentation will lead consumers to believe that the businesses are related and damage the applicant’s goodwill.
- Unlawful competition – this is a common law claim, and the applicant is required to establish that the opponent is carrying on their trade in a wrongful manner that unlawfully interferes with the applicant’s goodwill in the business.
- Cybersquatting – this refers to the pre-emptive registration of a trade mark belonging to another person as a domain name. For.za domain names, a domain name dispute can be filed with the South African Institute of Intellectual Property Law (SAIIPL) to challenge the cybersquatters. This is done in terms of the Alternative Dispute Resolution Regulations – GN R1166 of 2006, which were

enacted in terms of the Electronic Communications and Transactions Act 25 of 2002.

- Advertising Regulatory Board – where an advertisement exploits the advertising goodwill of a trade name or is an imitation of an existing advertisement, they are in contravention of the Code of Advertising Practice. An applicant may submit a complaint to the Advertising Regulatory Board.
- Company name dispute – if a third party has registered a company name that incorporates an individual’s trade mark, a company name dispute may be lodged with the Companies Tribunal. This is done under the terms of the Companies Act 71 of 2008.

Alternative Copyright Claims

The following alternative claims can be brought by a copyright owner or by a person performing a literary or artistic work:

- Authors’ moral rights – see discussion in 3.4 Copyright Rights.
- Performers’ protection – this applies to the performances or renditions of literary or other works that are protected. A performer’s right in the rendition of a work is infringed when a person broadcasts or reproduces the performance without consent of the performer. This is provided for by the Performers’ Protection Act 11 of 1967.

Copyright management information is not included in the Copyright Act 98 of 1978.

7.3 Factors in Determining Infringement

Please refer to the discussion in 7.2 Legal Claims for Infringement Lawsuits and Their Standards.

7.4 Prerequisites and Restrictions to Filing a Lawsuit

The prerequisites for filing trade mark or copyright lawsuits are as follows:

- Trade marks – the main prerequisite for instituting trade mark infringement proceedings is that the applicant must have a registered trade mark. It is standard practice that a formal letter of demand is sent to the infringer before proceedings are commenced, but there is no technical requirement to

do so. Furthermore, the proprietor must give notice in writing of their intention to institute infringement proceedings to every registered user recorded on the register.

- Copyright – the main prerequisite for instituting copyright infringement proceedings is that the applicant must be the holder of copyright in the work in question and be able to prove such ownership. It is standard practice that a formal letter of demand is sent to the infringer before proceedings are commenced, but there is no technical requirement to do so.

There are no statutory restrictions on trade mark owners or copyright owners asserting their rights against others. However, any issues relating to the proceedings can be dealt with in the proceedings themselves.

7.5 Lawsuit Procedure

Trade mark or copyright infringement proceedings can be instituted in any High Court in South Africa that has jurisdiction.

In the event that a party elects to use legal representation in any trade mark or copyright proceedings, then the usual attorney costs will follow. However, parties in trade mark or copyright litigation do not need to be represented by a lawyer (though it is encouraged as it is a specialised field of law).

Foreign trade mark and copyright owners may also bring infringement claims in South Africa. For trade marks, the proprietor of the mark will need to have a registered trade mark in South Africa – the only exception being famous/well-known trade marks.

As far as copyright is concerned, as long as the requirements for the subsistence of copyright are met (see 3.2 **Essential Elements of Copyright Protection**) – in particular, that the work was published in a country that is a member of the Berne Convention – the owner of the copyright will be able to bring an infringement claim in South Africa.

7.6 Declaratory Judgment Proceedings and Other Protections for Potential Defendants

The defendant in a trade mark infringement matter could potentially file an application for a declaratory

order. The circumstances and the potential defence to such application will depend on the matter and the declaratory order sought.

7.7 Small Claims

In South Africa, there are a number of small claims courts, which are administered by the Department of Justice and Constitutional Development. Any civil dispute can be taken to a small claims court, provided that the amount in dispute does not exceed ZAR20,000 (roughly USD1,250). Although this does not relate to trade mark or copyright claims in particular, an individual may approach these courts for relief.

7.8 Effect of Trade Mark and Copyright Office Decisions

A decision of the Registrar will have no bearing on an infringement action. Civil courts have the power to review any decision or ruling of the Registrar.

7.9 Counterfeiting and Bootlegging Counterfeiting

Under the terms of the Counterfeit Goods Act 37 of 1997, in order for there to be a cause of action on the basis of counterfeit goods, the following factors need to be proved by the applicant:

- the applicant is the owner of copyright or a trade mark incorporated in the opponent's goods and there has been an infringement of the applicant's copyright or trade mark;
- the goods in question are "protected goods" – ie, goods that bear the copyright or trade mark belonging to the applicant (with their permission); and
- an act of counterfeiting has taken place by the opponent, which means that the infringing goods are counterfeit goods.

A useful remedy for the owner of the copyright or trade mark that is incorporated in the counterfeit goods is to have the goods seized and destroyed.

A party can be subject to both civil and criminal liability should the party contravene the provisions of the Counterfeit Goods Act 37 of 1997.

Bootlegging

Bootlegging in South Africa refers to the illegal manufacture, distribution and sale of alcoholic products.

There are no special statutes dealing specifically with bootlegging. The products produced and sold as a result of these activities will fall within the ambit of the Counterfeit Goods Act 37 of 1997. As such, a party may be subject to both civil and criminal liability as referred to in “Counterfeiting” above.

8. Litigating Trade Mark and Copyright Claims

8.1 Special Procedural Provisions for Trade Mark or Copyright Proceedings

There are no special procedural provisions for trade mark or copyright proceedings. Moreover, there are no specialised IP courts. Copyright and trade mark cases are adjudicated by a legal judge, as South Africa does not follow the jury system nor does it have “technical judges” – instead, expert witnesses may be called in to provide a judge with a better understanding of a highly technical aspect of a matter. Parties to a matter have no influence on who the judge for a particular matter will be.

8.2 Effect of Registration

Please refer to **4.1 Trade Mark Registration** for the benefits of a trade mark registration.

If an infringer uses a mark in relation to the same goods/services as those included in the specification of the registered trade mark, it eases the evidentiary burden of the plaintiff as they do not need to prove that the goods/services are similar. That said, if the infringer is using the mark in relation to goods/services that are not included in the specification, the plaintiff will still be able to institute infringement proceedings – provided that the plaintiff can prove that the infringers goods/services are sufficiently similar to those of the plaintiff so as to result in confusion among consumers.

8.3 Costs of Litigating Infringement Actions

Please refer to **4.1 Trade Mark Registration** for the benefits of a trade mark registration. Costs are very difficult to estimate, as contentious matters are

charged on a professional time basis and will depend on the complexity of the matter, what steps are necessary, the amount of evidence involved in the matter, and how vigorously the other side pursues/defends the proceedings. In addition, some matters encounter interlocutory proceedings within the main proceedings and this leads to further substantial costs.

Counsel (ie, barrister) costs are dependent upon the level/experience of legal counsel briefed on the matter and the stage of the proceedings when counsel is brought in, as well as how involved counsel will be in the matter.

9. Defences and Exceptions to Infringement

9.1 Defences to Trade Mark Infringement

Section 43 (2) of the Trade Marks Act 194 of 1993 sets out the available defences to a claim of trade mark infringement, which are:

- the bona fide use by a person of their own name, the name of their place of business, the name of any of their predecessors in business or the name of any such predecessor’s place of business;
- the use by any person in a bona fide descriptive manner;
- the bona fide use of the trade mark in relation to goods/services where it is reasonable to indicate the intended purpose of such goods, including spare parts and accessories and such services;
- the importation into or the distribution, sale or offering for sale in the Republic of South Africa of goods to which the trade mark has been applied by or with the consent of the proprietor thereof;
- the bona fide use by any person of any utilitarian features embodied in a container, shape, configuration, colour or pattern that is registered as a trade mark;
- the use of the trade mark outside the limitations in respect of which it has been registered; and
- the use of any identical or confusingly similar trade mark that is registered.

The above-mentioned defences are absolute defences to a claim of trade mark infringement.

9.2 Defences to Copyright Infringement (Fair Use/Fair Dealing)

The Copyright Act 98 of 1978 makes the statutory provision that a copyright will not be infringed by any fair dealing of a literary or musical or artistic work for the purposes of:

- research or private study or the personal or private use of a person;
- criticism or reviewing work; or
- reporting current events (eg, newspapers, magazines or broadcasting).

However, there must be acknowledgement of the work by the source being mentioned or the name of the author of the work.

The Copyright Act 98 of 1978 does not allow for a defence of satire or parody to copyright infringement.

The Copyright Act 98 of 1978 does not explicitly outline an exception for freedom of expression or speech.

9.3 Exhaustion

In South Africa, the doctrine of exhaustion of trade mark rights applies to goods that are first sold and resold within the country. In other words, the proprietor has little control over the further distribution of the goods once they have consented to the selling of the goods on the market.

In South Africa, the exhaustion of copyright applies when a genuine article of work is sold and subsequently resold in the country. As per the foregoing explanation, a genuine article must be sold then resold for this principle to be applicable.

10. Remedies

10.1 Injunctive Remedies

Injunctive relief for a trade mark owner includes:

- interdicting and restraining the offending party from using the owner's trade marks;
- ordering the delivery up for destruction of the offending goods; and
- obtaining an inquiry into damage.

Injunctive relief for a copyright owner includes damages, an interdict, and the delivery of infringing materials.

In South Africa, judges have discretion over whether to grant the relief/remedies being requested by the litigants and to provide their reasons thereto. Injunctive relief will be granted when the court has satisfied itself that the party seeking relief has sufficiently pleaded their case and provided the court with relevant evidence thereto, regardless of the defences the other party may have raised to the claim. The court will take the following factors into account: jurisdiction, locus standi (ie, whether the plaintiff can bring the case in their own name), factual position and evidence.

A trade mark owner needs to establish proprietorship over the mark, and this can be done by way of furnishing a trade mark certificate or by providing evidence that will prove proprietorship (in the case of unregistered rights protected under common law). Evidence must be provided to prove that their rights have been infringed by the defendant and that the infringement has caused or will likely cause harm to their business through confusion in the market. In relation to copyright, the plaintiff must prove that they are the owner of the work, that it was reduced to material form, that it is original, and that they are resident of a Berne Convention country. In addition, the plaintiff must be able to show that their protected work was the source from which the offending work was derived and that the offending work was done without consent.

Grounds to Oppose Injunctions

A trade mark or copyright defendant may oppose a preliminary injunction in the following ways:

- trade mark – by proving consent, by pleading honest concurrent use and/or by proving the goods are parallel imports; and
- copyright – by pleading the conceptualisation of the offending work and how it was not sourced from the protected work.

10.2 Monetary Remedies

In trade mark and copyright matters, a party can be awarded actual damages or special damages. Where actual damages are awarded, the parties must embark on a damage-determining exercise, which is usually

through further litigation to recover the actual damages, unless the parties enter into a reasonable settlement agreement relating to damages that satisfies the aggrieved party. As regards special damages, these normally have to be proven (by way of documentary evidence) during litigation in order to persuade the court to grant them.

With regard to trade marks, damages can be calculated by assessing what monies authorised licensees have paid to the trade mark proprietor for use of the mark for a certain duration. The authorised licensees can then claim the equivalent of that amount from the offending party.

South Africa's trade mark law and copyright law do not provide for statutory damages.

10.3 Attorneys' Fees and Costs

In South Africa, costs normally follow the outcome of the matter. Both parties to litigation are responsible for all the litigation costs that are incurred on their part. However, they are both permitted to request the court for costs in their founding papers (as part of their relief) in order to be able to recover a portion of their legal fees upon finalisation of the order.

Once a court order in favour of one of the litigants is issued, the prevailing party is then placed in a position where a bill of costs can be drawn by a costs consultant (which will include attorneys' fees, counsel fees and disbursements) in order to have the costs taxed before a taxing master. The taxing master will assess the bill of costs and make a final decision on how much the losing party should pay towards the other party's fees. Having said this, it is possible for the unsuccessful litigant to make a reasonable offer to the successful party to pay for "untaxed" costs in order to avoid the process of formal taxation as the latter involves more costs for both parties.

10.4 Ex Parte Relief

The South African law follows the principle of *audi alteram partem* – meaning "let both parties be heard". For this reason, where a proprietor seeks relief in respect of their trade marks or copyright, notice of such proceedings must be given to the opposing party in order for them to exercise their right of whether to

defend the matter or not. Where the defendant elects not to defend the matter, then the plaintiff can proceed to obtain the desired relief on an unopposed basis.

10.5 Customs Seizures of Counterfeits or Parallel Imports

Parallel imports in South Africa are permitted and therefore customs seizure is not applicable.

As regards counterfeits, there are measures in place (eg, customs seizure) to combat counterfeit products. To succeed in this approach, one needs to have a registered and valid trade mark with customs. Once this is done, the relevant authorities can be alerted (upon obtaining a court order), so as to conduct a search and seizure of the infringing goods or to detail goods coming in at customs.

11. Appeal

11.1 Appellate Procedure

Trade mark infringement proceedings can be appealed to a full bench of the High Court of the Supreme Court of Appeal. A statement requesting a leave to appeal needs to be filed. If leave is granted, then a notice of appeal must be served on all relevant parties within 20 days. Any party may then file a notice of cross-appeal within ten days of the notice of appeal being served.

Copyright infringement proceedings are also appealed to the Supreme Court of Appeal.

11.2 Timeframes for Appealing Trial Court Decisions

A trade mark infringement decision can be appealed in the High Court within three months following receipt of written reasons from the Registrar. The decision may be handed down between 18 and 24 months after filing an appeal, depending on where the roll at court is.

A party must file a notice of appeal with the Registrar of the Supreme Court of Appeal within one month following the granting of the judgment in copyright infringement proceedings. A decision may be handed down between 12 and 18 months after filing and appeal.

12. Additional Considerations

12.1 Emerging Issues

There are currently no emerging issues concerning trade marks and copyright in South Africa. When it comes to emerging issues, South African courts generally refer to decisions of those foreign jurisdictions that share the same common law approach. Even then, these can be cited for persuasive value only and it is not set that the courts will follow them (ie, no *stare decisis*).

South Africa does not have any specific laws (in respect of either trade marks or copyright) that address works created by AI and so the law is, to date, unclear/uncertain on who would be the author of works generated by AI. There are more questions than there are answers on this topic and arguments can be made for either side of the coin. For instance, the Copyright Act 98 of 1978 defines “author” as including creators of “computer-generated works”. Given that AI-generated works have no human intervention (ie, creators), one can argue that they do not fall within the scope of “author” as intended by the Copyright Act 98 of 1978. However, the Copyright Act 98 of 1978 also provides that the “author” – for the purposes of “computer-generated work” – includes the person responsible for making arrangements for the creation of the work. The meaning behind “making arrangements for the creation of the work” is open for debate and, on this point, one can argue that it covers AI-generated works.

There are currently no landmark trade mark or copyright cases concerning AI.

12.2 Trade Mark and Copyright Use on the Internet

In South Africa, where third parties (eg, service providers) make unauthorised use of a trade mark, they can be approached with a letter of demand to have the offending use removed. Service providers usually do require proof of registration before compliance. However, where service providers are not persuaded by a letter of demand (coupled with proof of registration), the trade mark/copyright owner can approach the court for relief and then use the court order to force them into compliance.

Where third parties make unauthorised use of the marks on social media pages such as Facebook, Instagram or X (formerly known as Twitter), the proprietors of the marks have the option of filing take-down notices on these platforms. These will only be successful if the proprietors of the marks can prove – usually by way of registration – that they are the bona fide mark owners.

Trends and Developments

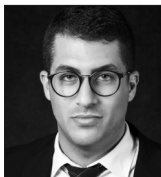
Contributed by:

Daniel Pekar
KISCH IP

KISCH IP has been a leader in IP and commercial matters in South Africa and Africa for more than 150 years. KISCH-IP's skilled partners, dedicated support staff and network of agents across Africa enable the firm to navigate various IP requirements across the continent. The firm has offices in South Africa and Jersey in the Channel Islands, and also has a growing tax advisory team. The trade mark department provides a full range of trade mark-related services in South Africa and internationally. This encompasses trade mark prosecution services at all stages, includ-

ing searches, filings, compliance, publication, registrations, recordals and amendments, assignments, licences and renewals. KISCH-IP also provides trade mark enforcement at all stages, including infringements, passing-off claims, ambush marketing, unlawful competition, company name objections, domain name disputes and consumer/advertising-related matters. In terms of copyright, the team provides advice on how and when copyright subsists, and how best to protect and enforce copyright to control the commercial exploitation of these rights.

Author



Daniel Pekar is a senior associate at KISCH IP in the trade mark prosecution department. His focus is on South African and international trade mark portfolio management, advising clients across various

industries with a wide array of prosecution and maintenance services. Daniel also advises clients in respect of compliance and enforcement of labelling regulations, copyright issues and several forms of intellectual property dispute resolution. Daniel frequently shares his knowledge on artificial intelligence as it relates to intellectual property, and his articles on labelling are regularly published.

KISCH IP

5 Inanda Greens Business Park
54 Wierda Road West
Wierda Valley
Sandton
Johannesburg 2146
South Africa

Tel: +27 11 324 3000
Fax: +27 86 603 6118
Email: info@kisch-ip.com
Web: www.kisch-ip.com

KISCH 

A Review of Selected Trade Mark Decisions in South Africa in 2025: How These Matters Will Likely Impact Trends and Trade Mark Developments

Introduction

We are pleased to provide a detailed review of four selected South African trade mark decisions heard in the course of 2025, specifically, in the Western Cape and Pretoria High Courts. The document serves as a practical tool in order to understand how various trade mark laws are interpreted by the South African courts and how some real-world issues are decided.

1. Woodlands Dairy Proprietary Limited v Sansom Farming CC and Others

Link: <https://www.saflii.org/za/cases/ZAGP-PHC/2025/298.html>

Gauteng High Court, Pretoria

Judgment: 10 March 2025

1.1 Background

The case was instituted by Woodlands Dairy (Pty) Ltd (the applicant) (“Woodlands”) against Sansom Farming CC (the first respondent) (“Sansom”).

Woodlands is a manufacturer of a range of dairy products marketed and sold under the brand “FIRST CHOICE” and has registered trade marks for “FIRST CHOICE” in the applicable classes. However, it is notable that these trade mark registrations were registered subject to a disclaimer of the words “FIRST CHOICE”, separately and apart from the mark as a whole.

Sansom is a small dairy business and proprietor of trade mark registration no. 2017/12516 “FRESH CHOICE” (stylised) in class 29 in respect of the following goods: “Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats”. It is noteworthy that the mark was also registered subject to a disclaimer, namely, of the words “FRESH” and “CHOICE”, separately and apart from the mark as a whole.

Woodlands applied for the cancellation of the “FRESH CHOICE” trade mark in terms of the Trade Marks Act 194 of 1993 (“the Trade Marks Act”) on the basis of confusing similarity between the “FRESH CHOICE” mark as compared to its “FIRST CHOICE” marks, and also argued that it will also be likely to deceive consumers, and dilute its brand reputation. In reply, Sansom argued that the “FIRST CHOICE” and “FRESH CHOICE” marks were distinct from each other, that the words “FIRST CHOICE”, “FRESH” and “CHOICE” are descriptive in nature, and that the disclaimers limit the applicant’s rights in these terms.

1.2 Discussion

The court compared the marks as a whole while considering their visual, aural and conceptual differences. The court held that the words “FIRST” and “FRESH” were descriptive in nature. Furthermore, the word “CHOICE” was similarly found not to be protectable as a trade mark as it was found to be a laudatory term. The court noted the differences in Sansom’s trade mark as in the stylised aspects such as the font and colour. The court upheld the disclaimers of the trade mark registrations, which reduced the scope for arguing confusing similarity due to the shared disclaimer of the word “CHOICE”.

Accordingly, the court held that the marks were not confusingly similar, nor would it be likely to deceive consumers or dilute Woodlands’ brand reputation, nor were the get-ups similar. The court therefore dismissed the application and awarded the costs to the respondent.

1.3 Recommendations

The trade marks registry will often call for disclaimers upon the examination of a trade mark application, and it might be tempting to accept such conditions in order to permit the application to acceptance without delay, or the additional costs of making submissions to the registry. However, it is always strongly recommended that disclaimers are carefully considered, and that such disclaimers are only accepted where it is clear there is no path to registration without agreeing to such conditions. The disclaimer for “FIRST CHOICE” as a single phrase is a cautionary tale and is an issue more generally.

This is because the proprietor intends to protect against third-party use of the term “FIRST CHOICE” in combination for certain goods, and should not have disclaimed the entire phrase, but rather each word separately. It is better to obtain a monopoly in a phrase on the basis of longstanding use in respect of limited goods, than register a mark which is disclaimed to a large extent, even if such mark covers a broader range of goods. While the submissions required for obtaining broader rights in the mark may be a more expensive path to registration, the registration itself will be more effective in asserting the rights that are intended for protection against competitors in the industry concerned.

2. *Burton’s Foods Ltd v Boxer Superstores (Pty) Ltd*

Link: <https://www.saflii.org/za/cases/ZAGP-PHC/2025/650.pdf>

Gauteng High Court, Pretoria

Judgment: 19 June 2025

2.1 Background

Burton’s Foods Ltd (the applicant) (“Burton’s Foods”) is the proprietor of trade mark “WAGON WHEELS” as a word mark registered in respect of “biscuits, non-medicated confectionery, biscuits containing non-medicated confectionery, and marshmallows”.

Boxer Superstores (the respondent) (“Boxer”) in 2020 lodged two applications for “WHEELS” (one with stylised wording and a biscuit logo, and the other only with stylised wording) in respect of “confectionery and baked goods, including biscuits and cookies”.

See Boxer’s applications [here](#).

Burton’s Foods opposed Boxer’s applications seeking their removal from the Trade Marks Register arguing that the Boxer’s applications were confusingly similar to its own registration. In response, Boxer submitted that the proposed marks were distinct from the registered mark “WAGON WHEELS” and asserted that protection for the “WAGON WHEELS” marks does not entitle the proprietor to exclusive rights over isolated portions of the mark.

2.2 Discussion

The central question was whether Boxer’s applications were so similar to “WAGON WHEELS” as to be likely to deceive or cause confusion under Section 10 (14) of the Trade Marks Act:

- **Composite marks and individual elements:** The court emphasised the settled principle that registration of a trade mark confers rights only in the mark viewed as a whole and not in its individual components (*Cadbury (Pty) Ltd v Beacon Sweets & Chocolates*). The court therefore rejected the argument that the word “WHEELS” within the composite “WAGON WHEELS” could be protected and capable of generating confusion with Boxer’s marks.
- **Likelihood of confusion test:** The court applying the well-known test evaluated whether a substantial number of average consumers, exercising ordinary caution, would likely be confused when encountering the respective marks in the marketplace. The assessment involved considerations of visual, aural and conceptual similarities. The court held that the plain wording of “WAGON WHEELS”, as compared to the design features such as the stylised wording and colour combination of the applications, resulted in notably different visual impressions. The marks were also different aurally, and the word “WAGON” also created a certain degree of conceptual dissimilarity between the marks. However, the court noted that the goods were effectively identical.
- **Goods and consumer attention:** As the court acknowledged that the goods were effectively identical and marketed in the same low-attention retail environments, that this could ordinarily increase the risk of confusion. Notwithstanding these aggravating factors, the court determined that the differences in appearance and sound, and the conceptual differences between the marks, outweighed any similarity simply from the shared word “WHEELS”.

The court dismissed Burton’s opposition and directed that Boxer’s trade mark applications proceed to registration. This case provides important lessons related below.

2.3 Recommendations

Composite mark protection should not be treated as conferring rights in individual words or elements in isolation. Practitioners should prepare applications for individual elements where protection is sought for such individual elements rather than filing for the composite version intending to minimise the costs or to mitigate rejection of the registry.

When reviewing the availability of a trade mark application, or in assessing whether to oppose a third-party application, it will be important to closely review the visual, aural and conceptual differences of any conflicting third-party marks. This assessment has been shown to carry a lot of weight, especially in comparing word marks against composite marks. What seems to be of a secondary importance is whether the consumer is more or less likely to be careful in their purchasing decisions (such as for low-cost goods or services). The extent of similarity between goods or services is a key consideration, but clearly, the degree of similarity between goods or services is not a “silver bullet” where the marks are arguably dissimilar visually, aurally and conceptually.

3. *Chrystal Spring Consumer Division Ltd v Salt of the Earth Products (Pty) Ltd*

Link: <https://www.saflii.org/za/cases/ZAW-CHC/2025/465.html>

Western Cape High Court, Cape Town

Judgment: 15 October 2025

3.1 Background

Chrystal Spring Consumer Division Ltd (the applicant) (“Chrystal”) is proprietor of the registered trade mark “SALT OF THE EARTH” in class 3 in respect of deodorants and related products.

Salt of the Earth Products (Pty) Ltd (the respondent) (“Salt”) used the same mark and claimed that it had been doing so since 2008 in connection with Himalayan salt products and, later, roll-on deodorants featuring certain stylised elements.

Chrystal instituted a trade mark infringement application in terms of Section 34 (1)(a) of the Trade Marks Act

relying on its trade mark registration and sought an interdict to restrain the respondent from using “SALT OF THE EARTH” for deodorants.

3.2 Discussion

The first issue was whether the applicants were required to prove a likelihood of deception or confusion where the marks were identical. The court applied the Supreme Court of Appeal decision in *Century City Apartments*, and held that the respondent’s mark was identical to the registered mark, and so, proof of confusion would not be necessary.

The respondent was required to establish in terms of Section 36 of the Trade Marks Act proof of continuous and bona fide use of the “SALT OF THE EARTH” trade mark on deodorants prior to the applicants’ use or registration. The evidence was, however, not sufficient as the invoices in evidence only covered a two-month period in 2015, the bank records did not specifically link to deodorant sales, and the confirmatory affidavits did not make specific reference to deodorant-related use. Further aggravating factors that the court addressed were that the respondent did not respond to demand letters, and that the respondent sought a counter-application for partial expungement of the applicant’s mark, which the court found was aimed at frustrating the application, as a misuse of the courts.

The court granted the interdict restraining the respondent from using the “SALT OF THE EARTH” mark in respect of deodorants, and the court required that the respondent attend to the removal or disposal of infringing materials. The counter-application was dismissed.

3.3 Recommendation

The first lesson to draw from this decision is that the respondent alleging honest concurrent use must present clear, product-specific evidence of continuous use of the mark, including sales data, marketing and distribution records tied to the relevant goods. Therefore, it is crucial to keep all relevant records of use of a mark stretching back to its first use, and over specific goods, should it be necessary to show honest concurrent use.

What is very important as a general matter is that one must respond to demand letters. In many cases, a failure to respond to a genuine dispute can be detrimental to a respondent's credibility. On this point, counter-applications should be grounded in genuine disputes, not used as a tactic. An attempt to frustrate the applicant will be viewed negatively, and the costs for such a counter-application borne by the respondent.

4. San Miguel Brewing International Limited v Power Horse Energy Drinks

Link: <https://www.saflii.org/za/cases/ZAGP-PHC/2025/1155.html>

Gauteng High Court, Pretoria

Judgment: 4 November 2025

4.1 Background

San Miguel Brewing International Limited (the applicant) ("San Miguel") filed two trade mark applications which Power Horse Energy Drinks (the respondent) ("Power Horse") opposed on the basis of its existing trade mark registrations, which it argued were confusingly similar. In response, San Miguel instituted an expungement application against Power Horse's trade mark registrations on the basis of non-use. Very shortly before the opposition hearing, San Miguel applied to stay the High Court opposition pending the outcome of the expungement case.

4.2 Discussion

The issue was whether the court should grant a stay of the opposition in favour of the expungement. The court held that a stay order must show, among other things, a substantial prevention of justice and a reasonable apprehension of irreparable harm. San Miguel argued that if its applications were successfully opposed it would lose legal standing in the expungement application. However, the court held that San Miguel failed to establish risk of prejudice and held that San Miguel would retain legal standing if the opposition was successful.

The court therefore ordered that the stay application be dismissed as the opposition and expungement proceedings could run concurrently without a risk of conflicting decisions.

4.3 Recommendation

It is worthwhile to note that the court expressed its frustration at the unnecessarily long-winded nature of the proceedings. This is certainly a caution against parties engaging in protracted proceedings where such matters can be resolved in a less drawn-out fashion.

Conclusion

We trust that our detailed review of four selected South African trade mark decisions provides practical guidance for trade mark developments and future trends in South Africa, not least, how to apply to register new brands in South Africa, and what to look out for, not to unduly limit trade mark rights, the importance of good record-keeping, and what not to do at the point of enforcement.

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