

# INTELLECTUAL PROPERTY

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**Note:** According to the World Intellectual Property Organisation (WIPO), **intellectual property** refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. Intellectual property is divided into two categories: (1) **industrial property**, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and (2) **copyright**, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.

***Patents, Designs, Trade Marks and Copyright Act 9 of 1916***, as amended in South Africa to April 1978.

**Summary:** Only the portions of this Act ([SA GG 727](#)) relating to patents and designs remain in force in Namibia, in truncated form, via the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 ([OG 112](#)). The remaining portions of the Act will be repealed by the Industrial Property Act 1 of 2012 ([GG 4907](#)), which has not yet been brought into force.

**Applicability to SWA:** The portions of this Act relating to patents were made applicable to SWA *in part* by section 5 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 ([OG 112](#)):

“The provisions of the Union Act with regard to the effect and duration of a patent, the renewal, extension, surrender and revocation of patents, the grant of compulsory licences, the amendment of Specifications, actions for infringement and the rectification of the register shall, insofar as such provisions are applicable, apply, *mutatis mutandis*, to patents granted under this Proclamation.”

The “Union Act” is defined in section 18 of Proclamation 17 of 1923 as “the Union Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916) and any amendment thereof”. The portions of the Act on patents were replaced in South Africa by the *Patents Act 37 of 1952* ([SA GG 4863](#)), which was not applicable to SWA.

The portions of this Act relating to designs were made applicable to SWA *in part* by section 9 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 ([OG 112](#)):

“The provisions of the Union Act with regard to the definition of design, the effect of registration, the duration and renewal of Copyright in a design, the assignment and transmission of designs, the cancellation of the registration of a design, the marking of articles, and the rectification of the register shall, in so far as such provisions are applicable, apply, *mutatis mutandis*, to designs registered under this Proclamation.”

The “Union Act” is defined in section 18 of Proclamation 17 of 1923 as “the Union Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916) and any amendment thereof”. The portions of the Act on designs were replaced in South Africa by the *Designs Act 57 of 1967* ([RSA GG 1732](#)), which was not applicable to SWA.

Section 17 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 originally made the provisions of this Act relating to copyright applicable to South West Africa. These portions of the Act were subsequently replaced by the *Copyright Act 63 of 1965* ([RSA GG 1128](#)), which was made expressly applicable to SWA.

Section 13 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 originally made the provisions of this Act relating to trademarks applicable to South West Africa. These portions of the Act were subsequently replaced by the *Trade Marks Act 62 of 1963* ([RSA GG 540](#)) in South Africa, and by the *Trade Marks in South West Africa Act 48 of 1973* ([RSA GG 3913](#)) in South West Africa.

The definition of “Union Act” in section 18 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 made it clear that the specified portions of the Act applied to SWA along with “any amendment thereof”.

**Transfer of administration to SWA:** The administration of this Act was transferred to SWA by the Executive Powers (Commerce) Transfer Proclamation (AG 28/1978), dated 28 April 1978. There were no amendments to the Act in South Africa after that date.

**Amendments:** The following pre-independence South African amendment was applicable to SWA –

- *Patents, Designs and Trade Marks Amendment Act 19 of 1947* ([SA GG 3809](#)).

**Cases:** *Ex Parte Hendrik Krekel* (unreported judgement, SWA Supreme Court, 1983/11/11); *Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477 (HC) (canvasses legislative history, holding that South Africa’s *Patents Act 37 of 1952* did not in any way repeal or otherwise affect the application or enforceability of the Proclamation in South West Africa; holding also that section 23(2) of the 1916 Act never applied to SWA).

## Patents and Designs Proclamation 17 of 1923.

**Summary:** This Proclamation ([OG 112](#)) was originally called the Patents, Designs, Trade Marks and Copyright Proclamation. Section 48(6) of the *Copyright Act 63 of 1965* ([RSA GG 1128](#)), which was expressly made applicable to SWA, amended the name of the Proclamation to the “Patents, Designs and Trade Marks Proclamation”. Section 83(2) of the *Trade Marks in South West Africa Act 48 of 1973* ([RSA GG 3913](#)) amended the name of the Proclamation to “Patents and Designs Proclamation”.

The Proclamation was extended to the Rehoboth Gebiet by Proc. 12/1930 ([OG 365](#)).

Only sections 1-9 and 18-24 as they relate to patents and designs remain in force. These sections will be repealed by the Industrial Property Act 1 of 2012, which has not yet been brought into force.

**Amendments:** The RSA *Copyright Act 63 of 1965* ([RSA GG 1128](#)), which was made expressly applicable to SWA, repealed sections 14-17*bis* of the Proclamation, and the remainder of the Proclamation insofar as it relates to copyrights, *except for* section 18*bis*.

The RSA *Trade Marks in South West Africa Act 48 of 1973* ([RSA GG 3913](#)) repealed sections 10-13 of the Proclamation, and the remainder of the Proclamation insofar as it relates to trade marks, and amended the long title and Preamble.

The Namibia Library and Information Services Act 4 of 2000 ([GG 2290](#)) repealed section 18*bis*.

**Regulations:** *Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477 (HC) discusses the applicability of regulations by virtue of section 19 of this Proclamation (at 495I-ff).

Wartime regulations were contained in Proc. 33/1940 ([OG 871](#)), as amended by Proc. 30/1944 ([OG 1133](#)). The Industrial Property Act 1 of 2012 repeals Proc 33/1940.

**Cases:** *Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477 (HC) (canvasses legislative history and interprets sections 1 and 18 to mean that only inventions in Namibia may be registered as patents and only by persons who are not importers).

*Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477 (HC) refers to patent legislation as “probably the most neglected area of statutory regulation in Namibia”:

In a world increasingly driven by globalised economies and markets; in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined; at a time when commerce and industries are increasingly based on and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind and its environment, it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments passed by colonial authorities in this country about a century ago (at 481J-482C).

***Merchandise Marks Act 17 of 1941***, as amended in South Africa to April 1978.

**Summary:** This Act ([SA GG 2893](#)) regulates the marking of merchandise and the packaging in which merchandise is sold.

**Applicability to SWA:** Section 1 defines “Union” to include “the Territory”, which is defined as “the territory of South West Africa”. Section 21*bis* states “This Act and any amendment thereof which may be made from time to time shall apply also in the Territory, including the Eastern Caprivi Zipfel referred to in section 3 of the South West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951), and in relation to all persons in that portion of the Territory known, as the ‘Rehoboth Gebiet’ and defined in the First Schedule to Proclamation No. 28 of 1923 of the Territory.”

**Transfer of administration to SWA:** The administration of this Act was transferred to SWA by the Executive Powers (Commerce) Transfer Proclamation (AG 28/1978), dated 28 April 1978. The only South African amendment to the Act after the date of transfer and prior to Namibian independence – the *Merchandise Marks Amendment Act 54 of 1987* ([RSA GG 10921](#)) – was not made expressly applicable to SWA.

Section 3(1)(a) of the transfer proclamation excluded the reference to the “Republic” in the Act from section 3(1) of the General Proclamation, meaning that “Republic” retained the meaning given to it in the definition section of the Act (South Africa and SWA).

**Amendments:** The following pre-independence South African amendments were applicable to SWA –

- *Merchandise Marks Amendment Act 3 of 1946* ([SA GG 3622](#))
- *Merchandise Marks Amendment Act 26 of 1951* ([SA GG 4601](#))
- *Merchandise Marks Amendment Act 39 of 1952* ([SA GG 4885](#))

- *Merchandise Marks Amendment Act 47 of 1954* ([SA GG 5302](#))
- *Merchandise Marks Amendment Act 55 of 1967* ([RSA GG 1732](#)).

Sections 8 and 9 of the Act were suspended until further notice by SA Government Notice 1321/1941 ([SA GG 2944](#)), which was withdrawn by SA Government Notice 451/1946 ([SA GG 3612](#)). However, these sections were again suspended until further notice by SA Government Notice 1682/1946 ([SA GG 3687](#)). No notice lifting this suspension has been located.

### ***Heraldry Act 18 of 1962***, as amended in South Africa prior to Namibian independence.

**Summary:** This Act ([RSA GG 202](#)) provides for the registration of coats of arms, badges and other emblems and established bodies to oversee this and all related matters.

**Applicability to SWA:** Section 1 defines “territory” as “the territory of South West Africa, including that part of the said territory known as the Eastern Caprivi Zipfel and referred to in section 38(5) of the South West Africa Constitution Act, 1968 (Act No. 39 of 1968)”. Section 27 states “This Act and any amendment thereof shall also apply to the territory.”

**Transfer of administration to SWA:** The relevant Transfer Proclamation is the Executive Powers (National Education) Transfer Proclamation (AG 1/1978), dated 11 January 1978. However, section 3(2)(b) of the transfer proclamation excluded this Act from the operation of section 3(1) of the General Proclamation, meaning that the administration of the Act was not transferred to SWA.

**Amendments:** The following pre-independence South African amendments were applicable to SWA –

- *Heraldry Amendment Act 54 of 1969* ([RSA GG 2401](#))
- *Heraldry Amendment Act 63 of 1980* ([RSA GG 7017](#))
- *Heraldry Amendment Act 22 of 1982* ([RSA GG 8071](#))
- *Education and Heraldry Laws Amendment Act 6 of 1984* ([RSA GG 9082](#)).

### ***Trade Marks Act in South West Africa 48 of 1973***, as amended in South Africa to April 1978.

**Summary:** This Act ([RSA GG 3913](#)) covers the registration of trade marks and certification marks. The Act will be repealed by the Industrial Property Act 1 of 2012 ([GG 4907](#)), which has not yet been brought into force.

**Applicability to SWA:** The Act’s title and subject matter indicate its applicability to SWA. Section 82 states “This Act and any amendment thereof shall apply also in the Eastern Caprivi Zipfel.”

**Transfer of administration to SWA:** The administration of this Act was transferred to SWA by the Executive Powers (Commerce) Transfer Proclamation (AG 28/1978), dated 28 April 1978. There were no amendments to the Act in South Africa prior to Namibian independence.

**Regulations:** Regulations are contained in RSA GN R.2498 of 14 December 1973 (initially cited as RSA GN R.2437/1973, but corrected by RSA GN R.87/1974).

Amendments to these regulations are contained in AG GN 40/1989 ([OG 5750](#)). GN 13/2001 ([GG 2470](#)) substitutes Schedule 1 of these regulations, with effect from 1 February 2001.

**Cases:** *Sparletta (Pty) Ltd v Namibia Breweries Ltd* 1991 NR 384 (HC).

## Copyright and Neighbouring Rights Protection Act 6 of 1994.

**Summary:** This Act ([GG 845](#)) provides for the protection of copyrights and performers' rights. It replaces the *Copyright Act 63 of 1965* ([RSA GG 1128](#)). The Act came into force on 15 March 1996 (GN 64/1996, [GG 1273](#)).

**Regulations:** Regulations made under the repealed legislation survive in terms of section 68(2) of the Act. Regulations in terms of the current Act are issued in GN 32/1996 ([GG 1257](#)) which repeals some pre-independence regulations (RSA GN R.407/1966, RSA GN R.408/1966, RSA GN R.414/1966, R.415/1966 and R.1289/1972).

**Related international agreements:** See below. Certain provisions of the Act are made applicable to the countries of the Berne Copyright Union by GN 127/2001 ([GG 2562](#)).

**Cases:** *S v Marume* 2007 (1) NR 12 (HC).

**Commentary:** Enynna S Nwauche, "The public interest in Namibian copyright law", *Namibia Law Journal*, Volume 1, Issue 1, 2009, available at [www.namibialawjournal.org.na](http://www.namibialawjournal.org.na).

## Industrial Property Act 1 of 2012.

**Summary:** This Act ([GG 4907](#)) provides for the registration and protection of patents, utility model certificates, industrial designs, trade marks, collective marks, certification marks and trade names. It also establishes an Industrial Property Office, a Registrar of Industrial Property, industrial property agents and an Industrial Property Tribunal. It repeals the *Patents, Designs, Trade Marks and Copyright Act 9 of 1916* ([SA GG 727](#)), the Patents and Designs Proclamation 17 of 1923 ([OG 112](#)) (which it erroneously refers to as the "Patents, Designs and Trade Marks Proclamation") and the *Trade Marks in South West Africa Act 48 of 1973* ([RSA GG 3913](#)). It will be brought into force on a date set by the Minister.

**Regulations:** There is no savings provisions regarding regulations issued under the repealed laws.

**Cases:** The following cases concern the predecessors to this Act-

*Ex Parte Hendrik Krekel* (unreported judgement, SWA Supreme Court, 1983/11/11) and *Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477 (HC) (concerning the repealed *Patents, Designs, Trade Marks and Copyright Act 9 of 1916*)

*Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477 (HC) (concerning the repealed Patents and Designs Proclamation 17 of 1923)

*Sparletta (Pty) Ltd v Namibia Breweries Ltd* 1991 NR 384 (HC) (concerning the repealed *Trade Marks in South West Africa Act 48 of 1973*).

**Related international agreements:** The Act specifically refers to the following international bodies and agreements-

WIPO agreements

- Paris Convention for the Protection of Industrial Property
- Madrid Agreement concerning the International Registration of Marks, and the Madrid Protocol adopted under that Agreement
- Hague Agreement concerning the International Registration of Industrial Designs
- Patent Co-operation Treaty
- Locarno Agreement Establishing an International Classification for Industrial Designs (to which Namibia was not yet a party as of August 2013)
- Nice Agreement concerning the International Classification of Goods and Services (to which Namibia was not yet a party as of August 2013)

WTO agreements

- Agreement Establishing the World Trade Organisation, 1994 and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), 1994 annexed thereto

ARIPO agreements

- African Regional Intellectual Property Organisation (ARIPO), the Harare Protocol on Patents and Industrial Design, 1982 and the Regulations issued thereunder, and the Banjul Protocol.

See the list of relevant international agreements below for more information.

## **INTERNATIONAL LAW**

### **Agreements administered by the World Trade Organisation**

#### ***Agreement Establishing the World Trade Organisation, 1994***

***- Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), 1994***

### **Agreements administered by WIPO**

#### ***Convention Establishing the World Intellectual Property Organization 1967, amended in 1979 (WIPO Convention)***

***Paris Convention for the Protection of Industrial Property, 1883, as revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and as amended in 1979***

***Berne Convention for the Protection of Literary and Artistic Works, 1886, as completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914) and revised at Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971) and amended in 1979***

***Madrid Agreement concerning the International Registration of Marks, 1891, as revised at Stockholm in 1967 and as amended in 1979***

***- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989***

***Hague Agreement concerning the International Registration of Industrial Designs, 1925, as governed by the 1999 Geneva Act***

***Patent Cooperation Treaty, 1970, as amended in 1979, and modified in 1984 and 2001***

***WIPO Copyright Treaty, 1996***

*WIPO Performances and Phonograms Treaty, 1996*  
*Beijing Treaty on Audiovisual Performances, 2012*

**Agreements administered by ARIPO**

*Lusaka Agreement on the Creation of the African Regional Industrial Property Organization (ARIPO), 1976, as amended*

*Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property Organization, 1982*

*Banjul Protocol on Marks within the Framework of the African Regional Industrial Property Organization, 1993*

*Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization, 2010*