

INTELLECTUAL PROPERTY

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 relating to patents and designs remain in force in Namibia.

Applicability to SWA: The portions of this Act relating to patents were made applicable to Namibia by section 5 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923. They were replaced in South Africa by the *Patents Act 37 of 1952*, which was not applicable to SWA.

The portions of this Act relating to designs were made applicable to SWA by section 9 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923. They were replaced in South Africa by the *Patents Act 37 of 1952*, 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Section 17 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 originally made the provisions of this Act relating to copyright applicable to South West Africa.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 62 of 1963*, 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Section 13 of the Patents, Designs, Trade Marks and Copyright Proclamation 17 of 1923 originally made the provisions of this Act relating to trademarks applicable to South West Africa.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 *Trademarks Act 62 of 1963* in South Africa, and by the *Trade Marks in South West Africa Act 48 of 1973* 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 thereto”.

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.

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 was originally called the Patents, Designs, Trade Marks and Copyright Proclamation. Only sections 1-9 and 18-24 as they relate to patents and designs remain in force.

Amendments: This Proclamation is amended by Proc. 33/1940, Proc. 30/1944, Ord. 10/1951, Ord. 26/1956 and Ord. 35/1960. It was extended to the Rehoboth Gebiet by Proc. 12/1930.

The RSA *Copyright Act 62 of 1963*, 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* repealed sections 10-13 of the Proclamation, and the remainder of the Proclamation insofar as it relates to trade marks.

The Namibia Library and Information Services Act 4 of 2000 repealed section 18*bis*, which dealt with copyright.

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).

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 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.

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).

One amendment to the Act in South Africa after the date of transfer and prior to Namibian independence -- the *Merchandise Marks Amendment Act 54 of 1987* -- contains an explicit reference to SWA.

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

Summary: This Act 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.

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

Summary: This Act covers the registration of trade marks and certification marks. It was originally known as the *Trade Marks in South West Africa Act*.

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 (15 July 1989). 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 provides for the protection of copyrights and performers’ rights. It replaces the *Copyright Act 63 of 1965*. The Act came into force on 15 March 1996

(GN 64/1996, GG 1273).

Regulations: Regulations are contained in GN 32/1996 (GG 1257).

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).

Articles: Enynna S Nwauche, “The public interest in Namibian copyright law”, *Namibia Law Journal*, Volume 1, Issue 1, 2009, available at www.namibialawjournal.org.

INTERNATIONAL LAW

Unless otherwise indicated, the source for the information in this section is the website of the World Intellectual Property Organization (www.wipo.org/treaties/).

Paris Convention for the Protection of Industrial Property, 1883, as amended in 1979

revised at Brussels (1900), Washington (1911) The Hague (1925), London (1934), Portugal (1958) and Stockholm (1967) and amended on 28 September 1979

ratification by Parliament: 28 March 2003 (source: Parliament)

deposit: 29 December 2003; effective date: 1 January 2004

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

accession: 23 December 1991

Namibia has NOT yet agreed to the following amendment:

* *Amendment to Article 9(3) of the WIPO Convention, 2000 (not yet in force internationally)*

Berne Convention for the Protection of Literary and Artistic Works, 1971

Berne Convention (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), at Brussels (1948), at Stockholm (1967) and at Paris (1971)

accession: 21 March 1990

effective date in respect of 1971 revisions (Paris): 24 December 1993

Declaration of Continuity of Berne Convention for Protection of Literary and Artistic Works

accession: 16 September 1993 (source: Ministry of Foreign Affairs)

Note: Certain provisions of Namibia’s Copyright and Neighbouring Rights Protection Act 6 of 1994 are made applicable to the countries of the Berne Copyright Union by GN 127/2001 (GG 2562).

WIPO Copyright Treaty, 1996

signature: 20 December 1996

not yet ratified by Namibia

WIPO Performances and Phonograms Treaty, 1996

signature: 20 December 1996

not yet ratified by Namibia

Madrid Agreement concerning the International Registration of Marks, 1891

accession: 31 March 2004

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

accession: 31 March 2004

Hague Agreement concerning the International Deposits of Industrial Designs of 1925, as governed by the 1960 Act and the Geneva Act

accession: 31 March 2004

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

ratification by Parliament: 28 March 2003 (source: Parliament)

accession: 1 October 2003; effective date: 1 January 2004

Reservation: Namibia does not consider itself bound by Article 59 of the Treaty.
(source: Ministry of Foreign Affairs)

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

accession approved by Parliament: 28 March 2003

(source: Ministry of Foreign Affairs)

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

accession approved by Parliament: 28 March 2003

(source: Ministry of Foreign Affairs)