

# 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.

## ***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.

**Repeals:** The various laws repealed by this Act do not appear to have been applicable to SWA.

**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.

**Regulations:** The Act makes no provision for regulations.

**Notices:** The following notices were issued in terms of the Act prior to the date of transfer.<sup>207</sup>

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<sup>207</sup> *Juta's Index to the South African Government and Provincial Gazettes* (formerly “The Windex”), 1920-1989 at page 448.

Minimum standards for items marked as E.P.N.S. ware (Electro-Plated Nickel Silver ware) are contained in SA GN 531/1950 ([SA GG 4341](#)).

Conditions for marking silver-plated articles imported into, or sold in, the Union are contained in SA GN R.1120/1952 ([SA GG 4849](#)). (This notice was qualified by SA GN 2613/1952 ([SA GG 4960](#)), which stated that it does not apply to the sale of goods which were in stock on 3 November 1952 and sold on or before 23 November 1953.)

Minimum standards for items marked as E.P.B.M. ware (Electro-Plated Britannia Metal ware) are contained in SA GN 2617/1952 ([SA GG 4960](#)).

The misleading use of the word “Knitting Wool” is prohibited by RSA GN 409/1963 ([RSA GG 458](#)).

The unauthorised use of the mark, emblem, seal and name of “United International Bureaux for Protection of Intellectual Property” is prohibited by RSA GN R.1396/1964 ([RSA GG 897](#)).

Wool labelling requirements are contained in RSA GN R.271/1973 ([RSA GG 3786](#)).<sup>208</sup>

## ***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](#)), which also repeals the *Protection of Names, Uniforms and Badges Act 23 of 1935* ([SA GG 2263](#))
- *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](#)).

**Regulations:** Regulations are contained in RSA GN R.828/1963 ([RSA GG 521](#), reprinted in [OG 2491](#)), as amended by RSA GN R.1884/1967 ([RSA GG 1903](#), reprinted in [OG 2843](#)).

These regulations are entitled “Regulations, Part I” in the *Government Gazette*, but “Regulations, Part II” in RSA GN R.829/1963 in the same *Government Gazette* were issued under the *Protection of Names, Uniforms and Badges Act 23 of 1935* in the form of amendments to the regulations in RSA GN R.856/1961 ([RSA GG 100](#)). The *Protection of Names, Uniforms and Badges Act 23 of 1935* was repealed by the *Heraldry Amendment Act 54 of 1969* ([RSA GG 2401](#)). The repealing provision contains no savings clause

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<sup>208</sup> This Government Notice repealed SA Government Notice R.1701/1959 (as amended by RSA Government Notice R.393/1966) which in turn withdraws SA Government Notice 2356/1948 (as amended by SA Government Notices 1087/1949, 2612/1950 and 2388/1954).

The 1973 notice was amended after the date of transfer by RSA GN R.1465/1987 (RSA GG 10818), which was not made explicitly applicable to SWA.

for regulations. “Regulations, Part II” concerned the transition of certain registrations under the *Protection of Names, Uniforms and Badges Act 23 of 1935* to registrations under the *Heraldry Act 18 of 1962*.

**Fees:** Fees are listed in RSA GN R.899/1978 ([RSA GG 6003](#)) (in the form of regulations).<sup>209</sup> This list of fees is not included in the database.

## Copyright and Neighbouring Rights Protection Act 6 of 1994

**Summary:** This Act ([GG 845](#)) provides for the protection of copyrights and performers’ rights. It was brought into force on 15 March 1996 by GN 64/1996 ([GG 1273](#)).

**Repeals:** The Act repeals the *Copyright Act 63 of 1965* ([RSA GG 1128](#)), which in turn repealed the provisions on copyright contained in the *Designs and Copyright Act 9 of 1916* ([SA GG 727](#)).

**Amendments:** The Act is amended by the Business and Intellectual Property Authority Act 8 of 2016 ([GG 6105](#)), which was brought into force with effect from 16 January 2017 by GN 293/2016 ([GG 6197](#)).

**Regulations:** Regulations issued under the current Act are contained in GN 32/1996 ([GG 1257](#)).

Regulations made under the repealed legislation survive in terms of section 68(2) of the Act.

Anything done under a provision of a law repealed by subsection (1) which could have been done under a corresponding provision of this Act, shall be deemed to have been done under such corresponding provision.

The repealed *Copyright Act 63 of 1965* ([RSA GG 1128](#)) contained a savings clause in section 48(2) for regulations on copyright made under the *Designs and Copyright Act 9 of 1916* ([SA GG 727](#)), stating that -

...any proclamation, regulation or rule having effect under any provision so repealed and in force at the commencement of this Act, shall continue in force and may be repealed, altered or amended as if it had been made under this Act.

However, the regulations issued under the current Act repealed all of the pre-independence regulations that remained in force:

- RSA GN R.407/1966 ([RSA GG 1402](#)) - Copyright (Notice of Intended Publication) Regulations, 1965
- RSA GN R.408/1966 ([RSA GG 1402](#)) - Copyright Royalty System (Records) Regulations, 1965<sup>210</sup>
- RSA GN R.414/1966 ([RSA GG 1402](#)) - Copyright Tribunal Rules, 1965
- RSA GN R.415/1966 ([RSA GG 1402](#)) - Copyright (Libraries) Regulations, 1965
- RSA GN R.1289/1972 ([RSA GG 3622](#)) - Copyright (Makers of Cinematographic Films) Regulations, 1972.

**Fees:** Regulations relating to fees for acts and services by BIPA relating to copyright are contained in GN 309/2019 ([GG 7032](#)).

**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 [here](#).

**Related international agreements:** Certain provisions of the Act are made applicable to the countries

<sup>209</sup> These regulations repeal the ones published in RSA GN R.2105 of 7 November 1975.

<sup>210</sup> These regulations repealed the regulations made under the *Designs and Copyright Act 9 of 1916* and published in SA GN 1545 of 1916, as amended by SA GN 317 of 1934 and SA GN 823 of 1942.

of the Berne Copyright Union by GN 127/2001 ([GG 2562](#)).

## 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 was brought into force with effect from 1 August 2018 by Government Notice 113/2018 ([GG 6616](#)).

**Repeals:** The Act 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](#)).

**Amendments:** The Act is amended by the Business and Intellectual Property Authority Act 8 of 2016 ([GG 6105](#)), which was brought into force with effect from 16 January 2017 by GN 293/2016 ([GG 6197](#)).

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

**Industrial Property Regulations** issued in terms of this Act are contained in GN 114/2018 ([GG 6616](#)). GN 114/2018 ([GG 6616](#)) repeals the following regulations, which were issued in terms of the *RSA Trade Marks Act in South West Africa 48 of 1973* ([RSA GG 3913](#)): SA RSA GN R.2498/1973 ([RSA GG 4109](#)), as corrected by RSA GN R.87/1974 ([RSA GG 4141](#)) and as amended by AG GN 40/1989 ([OG 5750](#)) and GN 13/2001 ([GG 2470](#)). This repeal was not really necessary since the Act contains no savings clause in respect of regulations issued under the statutes it repeals. (See section 140 of the Act).

**Rules: Industrial Property Tribunal Rules** made by the Industrial Property Tribunal Rules Board pursuant to section 227 of the Act are published in GN 131/2022 ([GG 7799](#)).

**Cases:** The following case concerns this Act:

*Namib Mills (Pty) Ltd v Bokomo Foods Namibia (Pty) Ltd* 2020 (3) NR 870 (HC) (section 194(1); criteria for determining what is contrary to “honest practices”).

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*)

*Elisenheim Property Development Co (Pty) Ltd v Guest Farm Elisenheim & Another* 2013 (4) NR 1085 (HC) (concerning the repealed *Trade Marks in South West Africa Act 48 of 1973*).

**Commentary:** P M Balhao, “Patentable Subject Matter in Namibia: A Comparative Analysis of the Requirements for Patentability” in Dunia P Zongwe & Yvonne Dauseb, eds, *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry*, Ministry of Justice, LRDC: 2017, available [here](#) (comparison with South Africa’s *Patents Act 57 of 1978*).

**Note on related international agreements:** The Act refers to the following international bodies and agreements (see sections 1, 12, 29, 37, 57, 63, 76, 85, 92, 126-129, 131, 198, 234) –

WIPO agreements:

**Note:** The World Intellectual Property Organization (WIPO) was established by the *Convention Establishing the World Intellectual Property Organization (WIPO Convention)*, 1967. Namibia is a party to this Convention, which is not mentioned in the Act.

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

*Madrid Agreement concerning the International Registration of Marks (Madrid System), 1891, as revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967), and as amended in 1979* (referred to as the “Madrid Agreement”)

*Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989* (referred to as the “Madrid Protocol”)

*Hague Agreement concerning the International Registration of Industrial Designs (Hague System), 1925, as governed by the 1999 Geneva Act* (referred to as the “Hague Agreement”; see Part 11)

**Notes:** The Hague Agreement consists of three separate Acts: the 1934 London Act, the 1960 Hague Act and the 1999 Geneva Act. States can join the 1960 Hague Act, the 1999 Geneva Act, or both. (The London Act, and the Additional Act of Monaco, were terminated with effect from 18 October 2016.) If a State accepts only one Act, then applicants for industrial design protection from that State can use the Hague system to obtain protection for their designs only in other states which are parties to the same Act. Namibia has joined only the 1999 Geneva Act. See the Namlex Appendix for more information.

*Patent Cooperation Treaty (PCT), 1970, as amended in 1979, and as modified in 1984 and 2001* (referred to as the “Patent Cooperation Treaty” in section 37 and as the “Patent Co-operation Treaty” in section 12 and Part 13)

*Locarno Agreement Establishing an International Classification for Industrial Designs* (to which Namibia was not yet a party as of 31 October 2020)

*Nice Agreement concerning the International Classification of Goods and Services* (to which Namibia was not yet a party as of 31 October 2020).

WTO agreements:

*Agreement Establishing the World Trade Organization (WTO) (Marrakesh Agreement), 1994* (see references to “WTO”)

*Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994* (referred to as “TRIPS”)

ARIPO agreements:

*Lusaka Agreement on the Creation of the African Regional Industrial Property Organization (ARIPO), 1976* (see references to “ARIPO”)

*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.*

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

## **SELECTED CASES**

*Mega Power Centre CC t/a Talisman Plant and Tool Hire v Talisman Franchise Operations (Pty) Ltd & Others* [2013] NAHCMD 156 (A 171/2013; 7 June 2013); *Mega Power Centre CC t/a Talisman Plant and Tool Hire v Talisman Franchise Operations (Pty) Ltd & Others* 2015 (2)



NR 315 (SC); *Mega Power Centre CC t/a Talisman Plant and Tool Hire v Talisman Franchise Operations (Pty) Ltd & Others* 2016 (4) NR 1174 (HC) (common-law delict of “passing off”).

## **COMMENTARY**

- S Amoo and S Harring, “Intellectual Property under the Namibian Constitution” in N Horn, A Bösl & A du Pisani (eds), *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades*, Konrad Adenauer Stiftung, 2010, available [here](#)
- Cislé S Jacobs, “The Intellectual Property Regime in Namibia: An Overview of the Legal, Institutional and Policy Framework” in Dunia P Zongwe & Yvonne Dauseb, eds, *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry*, Ministry of Justice, LRDC: 2017, available [here](#)
- P M Balhao, “Patentable Subject Matter in Namibia: A Comparative Analysis of the Requirements for Patentability” in Dunia P Zongwe & Yvonne Dauseb, eds, *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry*, Ministry of Justice, LRDC: 2017, available [here](#).

## **INTERNATIONAL LAW**

Agreements administered by the World Trade Organisation (WTO):

- †*Agreement Establishing the World Trade Organization (WTO) (Marrakesh Agreement), 1994*  
*Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994*

Agreements administered by the World Intellectual Property Organization (WIPO):

- \*\*Beijing Treaty on Audiovisual Performances, 2012**
- †*Berne Convention for the Protection of Literary and Artistic Works, 1886, as revised at Berlin (1908)*  
*Berne Convention for the Protection of Literary and Artistic Works, 1886, as revised in 1971 and amended in 1979*  
**\*\*WIPO Copyright Treaty (WCT), 1996**
- Convention Establishing the World Intellectual Property Organization (WIPO Convention), 1967*  
*Hague Agreement concerning the International Registration of Industrial Designs (Hague System), 1925, as governed by the 1999 Geneva Act*  
*Madrid Agreement concerning the International Registration of Marks (Madrid System), 1891, as revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967), and as amended in 1979*  
*Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989*
- \*\*Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013**
- Paris Convention for the Protection of Industrial Property, 1883, as revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967), and as amended in 1979*  
*Patent Cooperation Treaty (PCT), 1970, as amended in 1979, and as modified in 1984 and 2001*  
**\*\*WIPO Performances and Phonograms Treaty (WPPT), 1996**

Agreements administered by the African Regional Industrial Property Organization (ARIPO):

- Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO), 1976*  
*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.*

See also Business and Intellectual Property Authority Act 8 of 2016 (**BUSINESS**).