

INTELLECTUAL PROPERTY

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.

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: Pre-independence regulations have not been researched.

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](#)).

Regulations: Pre-independence regulations have not been researched.

Copyright and Neighbouring Rights Protection Act 6 of 1994

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

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 made under the repealed legislation survive in terms of section 68(2) of the Act. Pre-independence regulations have not been researched.

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).

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

Related international agreements: 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.kas.de.

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

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).

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*)

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 at <https://namiblii.org/system/files/other/lrdc-25-years/lrdc-25-years.pdf> (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 effective 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 at www.kas.de
- 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 at <https://namiblii.org/system/files/other/lrdc-25-years/lrdc-25-years.pdf>
- 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 at <https://namiblii.org/system/files/other/lrdc-25-years/lrdc-25-years.pdf>.

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**).