



TRADE MARKS

An introduction to Trade marks for Small and Medium -size enterprises



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PROPERTY
INSTITUTE

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PREFACE

The Kenya Industrial Property Institute (KIPI) is a corporate body established under the Industrial Property Act, 2001. The Institute is under the Ministry of Trade and Industry. The Act provides for establishment of a Board of Directors, which oversees the general management of the Institute. The Institute is headed by a Managing Director who implements two Acts of Parliament namely, the Industrial Property Act, 2001 and the Trade Marks Act, Cap 506. The main functions of the Institute are to grant and register industrial property rights which include patents, industrial designs, utility models and trade and service marks; screen technology transfer agreements and licences; provide to the public industrial property information and promote use of industrial property (IP) in Kenya. The Industrial Property Act, 2001 also provides for the establishment of the Industrial Property Tribunal whose main function is to hear and determine appeals from the decisions of the Managing Director.

The World Intellectual Property Organization (WIPO) is one of the 16 specialized agencies of the United Nations system of organization, with its headquarters in Geneva, Switzerland. WIPO administers 23 international treaties dealing with different aspects of intellectual property protection. Intellectual property includes trade/service marks, geographical indications, patents, utility models, industrial designs, integrated circuits, copyright and related rights, and plant breeders' rights. The treaties administered by WIPO in relation to trade/service marks are the Paris Convention, Madrid Protocol and Agreement, the Trademark Law Treaty, the Nice Agreement concerning the International Classification of Goods and Services and the Vienna Agreement establishing the International Classification of the Figurative Elements of Marks.

The World Trade Organization (WTO) is an intergovernmental organization established by the Marrakesh Agreement concluded on 15th April 1994 and entered into force on 1st January 1995. WTO administers the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement). The TRIPS Agreement is a multilateral trade agreement that binds all members of WTO to provide protection to all categories of intellectual property.

Protection of marks is very important to the business community. Like our own unique fingerprints that identify who we are, a company's trade marks identify its products or services in the market place. Consumers make choices based on quality, reliability and value expected from particular products or services. Consumers know what products to reach for on the shelf or pass over the ones that do not meet their

needs or expectation because they recognize their marks. With so many similar products and services available world wide, companies depend on trademarks to build consumer confidence. In the recent past there has been a public outcry from proprietors of marks and consumers over counterfeit products. Available statistics indicate that trade in counterfeit products cost the Kenyan Government losses of up to Kenya shillings ten billion annually in tax revenue. In addition the illegitimate trade has led to collapse of some of the major industries. The government, manufacturers and consumers alike have felt the devastating effects of counterfeit products which include erosion of brand equity and trademark reputation, loss of market segments to unscrupulous traders, closure of factories, lay offs and retrenchment, loss of sales revenue, increased consumer complaints when goods are substandard, product failure while some pose health problems to consumers.

This guide explores and provides, from a business perspective, practical and user-friendly information on trademarks to users and potential users such as entrepreneurs, Small and Medium Size Enterprises (SMEs) and other stakeholders. The guide is designed to be an introduction to trade and service marks registration procedures and to outline how one can use the resources of the Institute to protect their marks. It is not, however, a comprehensive text on trademark laws.

For more detailed information on how to register your trademark, you may visit the Institute or consult the Trademarks Act, Cap 506 of the Laws of Kenya, available from the Government Printer.

Managing Director

TABLE OF CONTENTS

1. Trade Marks	1
2. Protecting your Trade marks	4
3. Types of Trade marks	11
4. Using your Trade mark	12
5. Enforcing your Trade mark	16
6. Annexes	23

1. Trademarks

In Kenya, registration of marks is governed by the Trademarks Act, Cap 506 of the Laws of Kenya.

numeral or any combination whether in two dimensional or three-dimensional form.









What is a Trademark¹?

A trademark is a distinctive sign, which distinguishes the goods or services produced or provided by one enterprise from those of another.

A number of countries also allow the registration of less traditional forms of trademarks such as single colours, audible signs (sounds) or olfactory signs (smells). Other countries have set limits to what can be registered as a trademark, generally allowing signs that are visually perceptible or can be represented graphically.

A mark includes any distinctive word, letter, slogan, device, brand-name, heading, label, ticket, name, signature or

Examples of Trademarks

Words:		<i>"Yes" is a registered mark of Kencell Communications Limited.</i>		<i>"JOGOO" is a registered mark of Unga Limited</i>
Device		<i>The device is a registered mark of Nation Media Group.</i>		<i>The wind mill device is a registered mark of Unga Limited</i>
Combinations of letters with devices		<i>"KTN" is a registered mark of the Standard Group "KTN" is a registered mark of the Standard Group</i>		<i>"KCB" is a registered mark of Kenya Commercial Bank</i>
Three-dimensional marks:	Coca-Cola bottle <i>The contour device of a bottle is a registered mark of Coca Cola Company</i>			
Slogan		<i>"the pride of Africa" is a mark of Kenya Airways.</i>	COUNTRY MY BEER	<i>"MY COUNTRY MY BEER" is a mark of East Africa Breweries Limited.</i>
Numerals		<i>"0722" is a registered mark of Safaricom limited</i>	504	<i>"504" is a mark of Automobiles Peugeot of France</i>

¹ This guide applies equally for trade marks (used for goods) and service marks (used for services).

What are trademarks for?

The main function of a trademark is to enable consumers to **identify a product** (whether a good or a service) of a particular company so as to **distinguish it from other identical or similar products** provided by competitors. Consumers who are satisfied with a given product are likely to buy or use the product again in the future. For this, they need to be able to distinguish easily between identical or similar products.

By enabling companies to differentiate themselves and their products from those of the competitors, trademarks play a pivotal role in the **advertising and marketing strategies** of companies contributing to define the **image, goodwill and reputation** of the company's products in the eyes of consumers. The image and reputation of a company, built on the basis of the performance of its products in terms of meeting the needs of the consumers, creates **trust**. Such trust is the basis for establishing a **loyal clientele**. Consumers often have an **emotional attachment** to certain trademarks, as they are associated with a set of desired qualities or features embodied in the products bearing such trademarks.

Trade marks also provide an incentive to companies to invest in maintaining or improving the quality of their products in order not to deceive customers and ensure that products bearing the trade mark have a positive reputation.

The Value of Trade marks

A carefully selected and nurtured trademark is a **valuable business asset**

for a company. For some, it may be the most valuable asset they own. Estimates of the value of some of the world's most famous trademarks such as Coca-Cola or IBM, exceed 50 billion dollars each. This is because consumers value trademarks, their reputation, their image and a set of desired qualities they associate with the mark and are willing to pay more for a product bearing a trademark that they recognize and meets their expectations. Therefore, the very ownership of a trademark with a good image and reputation provides a company with a competitive edge over its competitors.

Examples of valuable marks in the Kenyan market.



"Kasuku" is a registered mark of Kapa Oil Refineries Limited



"Tusker" is a registered mark of East African Breweries Limited.



"OMO" is a registered mark of Unilever Limited

Why should your company protect its trademark(s)?

While most businesses realize the importance of using trademarks to differentiate their products from those of their competitors, not all realize the importance of protecting them through registration.

Registration gives your company the **exclusive right to prevent others from marketing identical or similar products under the same or a confusingly similar mark.**

Without protection, your investments in marketing a product may become wasteful, as rival companies are able to use the same or confusingly similar trademark for identical or similar products. Imagine what would happen if a **competitor** adopts a similar or identical trade mark. Customers would be misled into buying the competitor's product thinking it is your company's product. This would not only decrease your company's profits and confuse your customers, but may also damage the reputation and image of your company, particularly if the rival product is of inferior quality.

Given the potential value of trademarks and the importance that a trademark may have in determining the success of a product in the marketplace it is critical to make sure that it is adequately protected.

In addition, **a registered trademark may be licensed** to other companies, thus

providing an additional source of revenue for your company, or may be the basis for a **franchise agreement.**

On occasions, a registered trademark with a given reputation among consumers may also be used to obtain funding as collateral from financial institutions that are increasingly aware of the importance of brands for business success.

A trademark:

- Ensures that consumers can distinguish between products
- Enables companies to differentiate their products
- Is a marketing tool and the basis for building a brand image and reputation
- May be licensed and provide a direct source of revenue through royalties
- May be a crucial component of franchising agreements
- May be a valuable business asset
- Encourages companies to invest in maintaining product quality
- May be useful for obtaining financing

2. Protecting your Trademarks

How can your company protect its trademark(s)?

In Kenya trademark protection may be obtained through **registration** or **use**. Even though trademarks may be protected through use, you are well advised to register the trademark by filing the appropriate application form with the Institute, as registration will provide stronger protection, particularly in the case of conflict with an identical or confusingly similar trademark. Under the Act no person is entitled to institute any proceeding to prevent, or to recover damages for the infringement of an unregistered trademark. Kenyan Citizens may or may not use the services of a trademark agent to register a mark. However, foreigners **MUST** use the services of a local agent.

Is the registration of the trade name of your company sufficient?

Many people believe that by registering their business and its trade name under the Registration of Business Names Act, Cap 499 of the Laws of Kenya and The Companies Act, Cap 486 of the Laws of Kenya, this name would also be automatically protected as a trademark. This is a rather common misconception. It is important to understand the difference between trade names and trademarks.

A trade name is the full name of your business, such as: "BIDCO OIL REFINERIES LIMITED" and it **identifies**

your company. It means the name or style under which any business is carried on whether in partnership or otherwise or as a limited company. It often ends with Limited, enterprises or other similar titles that denote the legal character of the company.

A trademark, however, is what distinguishes the product(s) of your company from those of other companies. A company may have various trademarks. For instance, BIDCO OIL REFINERIES LIMITED sells one of its products as "CHIPSY" and another as "GOLDEN FRY".



Companies may use a specific trademark to identify all their products, a particular range of products or one specific type of product produced by the company. For example UNGA LIMITED uses the device of a WIND MILL on all their products.



Some companies may also use their trade name or part of it as a trademark. For example, **Kenya Tea Packers limited** uses KETEPA as a trademark.

So, registering your business and its name with the Companies Registry does not offer trademark protection, even if the latter is identical to the trade name. You should make sure you register your trademark at the Institute irrespective of whether you have registered the business name or not.

Who is authorized to apply for trademark registration?

Any person who intends to use a trademark or to have it used by third parties can apply for registration. That person can be either a natural person or a legal entity. A legal entity is a business name or a company registered as outlined above.

Is it compulsory to register a trademark?

While it is not compulsory, it is highly advisable, since registration provides exclusive rights to prevent unauthorized use of the trademark. In addition, having a registered trademark may prove useful in the event of infringement proceedings in court; the owner of a registered trademark may also claim damages.

What is registrable as a trademark?

In order for a trademark to be registrable, it must contain or consist of at least one of the following essential particulars as stipulated in the Section 12 of the Act. These are;

- the name of a company, individual or firm, represented in a special or particular manner;
- the signature of the applicant for registration or some predecessor in his business;
- an invented word or invented words;
- a word or words having no direct reference to the character or quality of the goods, and not

being according to its ordinary signification a geographical name or a surname;

- any other distinctive mark.

The key requirement is therefore **DISTINCTIVENESS**.

What are the main reasons for rejecting an application?

The Registrar will reject an application for a mark that is identical or which resembles a mark belonging to another proprietor and is already registered or pending registration, or if it so nearly resembles such other mark as to be likely to deceive or cause confusion.

When choosing a trademark for your business, it may also be helpful to know which categories of signs are usually not accepted for registration. Applications for trademark registration are usually rejected on what are commonly referred to as “absolute grounds” in the following cases:

Absolute grounds

1. **Generic terms.** These are the actual names of the products in question. For example, if your company intends to register the trademark CHAIR to sell chairs, the mark would be rejected since “chair” is the generic term for the product.
2. **Descriptive terms.** These are words that are usually used in trade to describe the product in question. For example, the mark SWEET is likely to be rejected for marketing juice as being descriptive. In fact, it would be considered unfair to give any single

juice manufacturer exclusivity over the word “sweet” for marketing its products. Similarly, qualitative or laudatory terms such as “RAPID”, “BEST”, “CLASSIC”, “SUPER” “BEAUTIFUL” or “INNOVATIVE” are likely to give rise to similar objections unless they are part of an otherwise distinctive mark. In such cases, it may be necessary to include a disclaimer clarifying that no exclusivity is sought for that particular part of the mark. For example if Sony Sugar Company Limited applied for registration of the mark “SONY SUGAR” for sugar, they would be required to disclaim the right to the exclusive use of the word “SUGAR” separately and apart from the mark as a whole.

3. **Deceptive trademarks.** These are trademarks that are likely to deceive or mislead consumers as to the nature, quality or geographical origin of the product. For example, marketing pork products such as bacon under a trademark featuring a COW would be rejected, as it would be considered misleading for consumers, who are likely to associate the mark with beef products.
4. **Marks considered to be contrary to public order or morality.** Words and illustrations that are considered to violate commonly accepted norms of law, morality or any scandalous design in Kenya are not allowed to be registered as trademarks.
5. **Flags, armorial bearings, official hallmarks and emblems of states and international organizations** which have been communicated to

the International Bureau of WIPO are usually excluded from registration. For example, the Kenyan flag may not be registered for marketing Kenyan tea without authorization from the government.

Relative grounds

Applications are rejected on “relative grounds” when:

1. **The trademark is in conflict with prior trademark rights.** Having two identical (or very similar) trademarks for the same type of products could cause confusion among consumers. For example **JETEPA** would not be accepted for registration as a mark for tea due to existence of the mark **KETEPA** for the same products. The registry checks for conflict with existing marks, including unregistered well-known marks as a regular part of the registration process. If the registry considers your trademark to be identical or confusingly similar to an existing one for identical or similar products, it will be rejected. It would therefore be advisable to avoid using trademarks that risk being considered confusingly similar to existing marks.
2. **The mark is, in its ordinary signification, a geographical name or a surname.** In such cases proof of secondary meaning may be required before registration.

What should be kept in mind when selecting or creating your trademark?

Selecting or creating an appropriate

trademark is a critical step, as it is an important element of the marketing strategy of your business. So what is an appropriate trademark for your product(s) or services? Evidently, there are no hard and fast rules. Nevertheless, recommendations such as the following should always be kept in mind.

Five point checklist for selecting your trademark

- Check that your trademark of choice meets all the **legal requirements** for registration (see what is registrable as a trademark above)
- Do a **trademark search** to make sure that it is not identical or confusingly similar to existing trademarks (see below)
- It is advisable that the trademark is **easy to see, read, write, spell and remember** and is suitable to all types of advertising media
- Make sure the mark does not have any **undesired connotations** in your own language or in any of the languages of potential export markets.
- It is convenient that the corresponding **domain name** (i.e. Internet address) is available for registration (more on the relationship between trademarks and domain names on page 13).

While selecting one or more words as your trade mark you should also take into consideration the implications of selecting the following types of words:

a) Coined or “fanciful” words. These are invented words without any intrinsic or real meaning. Coined

words have the advantage of being easy to protect, as they are more likely to be considered distinctive. On the negative side, however, they may be more difficult to remember for consumers requiring greater efforts in advertising the products.

Example:



"Royco" is a registered trade mark of Unilever Limited

b) Arbitrary marks: These are words that have a meaning that is not related to the product they advertise. While these types of marks will also be easy to protect, they may also require heavy advertising to create the association between the mark and the product in the minds of consumers.



Example:

"KASUKU" is a registered trade mark of Twiga Stationeries & Printers Limited

c) Suggestive marks. These are marks that hint at one or some of the attributes of the product. The appeal of suggestive marks is that they act as a form of advertising. A slight risk, however, is that the Registrar may consider a suggestive mark to be too descriptive of the product and reject

¹ Please see annex for relevant forms

its registration.

Example: The trademark **CHIPSY** for marketing cooking fat would hint at the fact that the product is meant for frying chips. However, one needs to be cautious since some trade mark registries could possibly find the mark to be too descriptive and be reluctant to register it.



"CHIPSY" is a registered trademark of BIDOC Oil Refineries Limited

Note:

Irrespective of the type of mark you choose, it is important to avoid imitating existing trademarks. A slightly altered competitor's trademark or a mis-spelt well-known or famous mark is unlikely to be registered.

Example: **PEPTANG** is a known trademark for tomato sauce owned by Premier Foods Industries Limited. It would be unwise to try to sell the same or similar products using the trademark **BEBTANG** as it will probably be considered to be confusingly similar to the existing mark and is unlikely to be registered.

Registering a Trademark

Though not mandatory, you may request the Registrar to carry out a search and give preliminary advice (By filing trademark form TM 27)¹ as to registrability of your mark. Alternatively, you may carry out your own search referred to as the personal search. It is advisable to carry out a search before you apply for registration to avoid conflict with a similar

or identical mark.

You then send or hand in a duly completed trademark application form(TM 2), which shall include your contact details, illustration of the mark, description of the goods and or services and class (es) for which you wish to obtain trademark protection, and pay the required fees. In Kenya, an international classification of goods and services known as the Nice Classification (see annex II) is applied from which you will choose those which correspond with the use of your trademark.

The steps taken by the Institute are as follows:

1. Formality Examination.

The application is examined to make sure that it complies with formality requirements i.e., whether the application fee has been paid, the application form is properly filled in and contains all the necessary information.

2. Substantive Examination

The application is then examined to verify whether it complies with all **substantive requirements** i.e., whether it belongs to a category, which is excluded from registration by the Act and whether the trademark is in conflict with any existing mark on the register.

3. Publication Once it has been decided that there are no grounds for refusal, the trademark is published in the Industrial Property Journal or in the Kenya Gazette allowing a period of 60 days for any person to give notice of **opposition**.

4. Registration When an application for registration of a trademark has been

accepted and either (a) the application has not been opposed and the time for notice of opposition has expired; or (b) the application has been opposed and the opposition has been decided in favour of the applicant and unless the application has been accepted in error the trademark is registered. The initial registration is valid for 10 years.

5. Renewal

The mark may be renewed indefinitely by paying the required renewal fees after every 10 years. However the mark may be removed from the register by the Registrar for non-payment of renewal fee.

6. Non use of the mark

Under the Act, there is no requirement of proof of use or a declaration of intent to use the mark for purposes of application. However, once the mark is registered, any person may apply for its removal from the register if the mark has not been in use for a continuous period of 5 years.

The Institute will give you more precise information concerning the application process.

How long does it take to register a trademark?

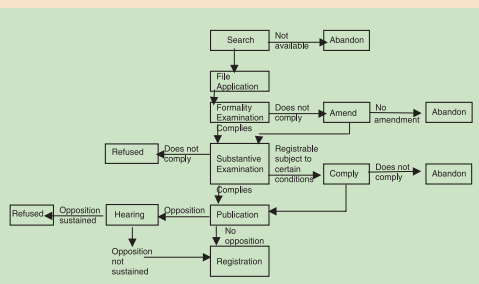
The time required for the registration of your trademark will vary, generally ranging from 6 months to 2 years, depending, among other things, on how long the applicant takes to comply with registration requirements.

What are the costs associated with trademark creation, protection and use?

It is important to keep in mind and properly budget the costs related to the trademark registration process and its subsequent use. These include:

1. Costs associated to the creation of the device or word to be used as a trademark as many companies subcontract its creation to consultants
2. Costs for conducting a trademark search.
3. Costs associated with the registration process, which will vary depending on coverage (number of countries that the trademark will be protected), and the categories of products or trademark classes for which protection is sought.
4. Applicants who use trademark agents to assist in the registration process would face additional costs but would probably save significant time and energy in following the registration process.
5. Costs associated to the use of the

Application Process



trademark e.g. by including it in all envelopes, letterheads, labels, packaging, advertising etc.

What is a Trademark search?

Before submitting an application for registering your trademark, it is advisable that a proper **trademark search** be carried out. This is done to make sure that the trademark you intend to use, or a similar one, is not already registered by another company for identical or similar products or services.

There are two types of searches namely

- (a) official search where the institute carries out the search upon request by the applicant or his agent or
- (b) personal search in which the search may be conducted directly by the applicant or an agent, upon payment of prescribed fees.

In whatever manner it is done; bear in mind that any such trademark search is only preliminary. It may be difficult to make sure that your trademark of choice is not “*confusingly similar*” to existing validly registered trademarks or pending applications. Guidance of an experienced trademark agent, who is familiar with the practice of the Institute and court decisions, may be very helpful.

A Well-classified System

While filling in your trademark application form you are required to indicate the goods and/or services for which you wish

to register your trademark and to group them according to “classes”. The classes refer to the classes in the **trademark classification system**. The trademark classification system allows storage of data on registered trademarks in an orderly manner in relation to the types of goods or services. This makes it easier to retrieve information from trademark databases. It is critical to register your trademark in all classes in which you intend to use your trademark.

The Institute uses the International Trademark Classification system referred to as the Nice System for classification of word marks, which has 34 classes for goods and a further 11 for services (for more information on Nice Classification system please visit <http://www.int/classifications/en/nice/about>)

How are products classified? Let us take an example. If your company is producing knives and forks, then your trademark application should be made for the corresponding goods in class 8. If, however, you wish to market other kitchen utensils (such as containers, pans or pots) using the same trademark you will also have to register the mark for the corresponding goods in class 21. You may cover a number of classes with a single application, the system referred to as the multiple class filing.

Do you need a trademark agent to file a trademark application?

If you reside in Kenya or have a principal place of business in Kenya, you do not require a trademark agent to file an application: you may file the application

yourself. But the services of a trademark agent skilled in conducting trademark searches and familiar with the detailed procedure for trademark registration may be conveniently used to save significant time and energy and to avoid refusal on absolute grounds. An applicant is required to use a local trademark agent if he is non-resident or if his principal place of business is outside Kenya. Like wise if you apply for trademark registration abroad you may be required to have a trademark agent who is resident in that country.

For how long is your registered trademark protected?

Registered trademarks are protected for initial 10 years but the registration may be renewed indefinitely for consecutive periods of 10 years, provided renewal fees are paid in time.

Is trademark registration in Kenya valid internationally?

The legal rights arising out of a trademark registration are normally limited to the territory within which it is registered; so, ordinarily, valid registration of a trademark in Kenya gives you rights only in Kenya unless your mark is considered to be a "well-known mark." (For information on well known marks see page 12).

If your trademark is developed by another company, who owns the trademark?

When the creation of a trademark is subcontracted, it is usually best to clarify

issues of ownership in the original agreement with the other company or consultant in order to avoid potential disputes concerning ownership.

Should you consider protecting your trademark abroad?

All the main reasons for registering your trademark in Kenya also apply to the commercialisation of your products in foreign markets. It is therefore highly advisable to **register your trademark abroad** if you are currently engaged in export operations or intend to do so in the near future. Exporting goods bearing a distinctive trademark will enable your export products to be recognized in foreign markets allowing your company to build a reputation and image among foreign consumers that may result in higher profits for your company.

How can you register the trademark of your company abroad?

If you have registered the trademark of your business in Kenya but now wish to export or grant a license to another company to use the trademark in other countries, then it is advisable to register the trademark abroad. There are two main ways to do so:

1. **The National Route:** your business may apply to the trademark office of each country in which it is seeking protection by filing the corresponding application and paying the required fees. As indicated earlier, a country may require you to use the services of a locally based trademark agent for this purpose.

2. **The International Route:** Kenya is a member of the Madrid System and if your trademark has been registered or applied for in Kenya, you may use the Madrid System administered by WIPO to register your trademark in the up to 70 countries that are party to the System. A list of current member countries of the Madrid System is available in Annex II.

Advantages of using the Madrid System

The principal advantages of using the Madrid System are that the trademark owner can protect his trademark in all the countries party to the System by filing:

- **a single international application**
- **in one language**
- **subject to one set of fees and deadlines,**

Thereafter, the international registration can be maintained and renewed through a single procedure.

You may find more information on international registration of marks either at the Institute or on the WIPO web site:

www.wipo.int/madrid/.

3. Types of Trademarks

Trade marks: Marks used to identify certain goods as those produced by a specific enterprise.

Service marks: Marks used to identify certain services as those provided by a specific enterprise.

Collective marks: Marks used to identify goods or services produced or provided by members of an association.

Certification marks: Marks used to identify products that comply with a set of standards and have been certified by a certifying authority.

Well-known marks: Marks that are considered to be well known in the market and as a result benefit from stronger protection.

What is a Service Mark?

A service mark is very similar in nature to a trademark. Both are distinctive signs; trademarks distinguish the goods of one enterprise from those of others, while service marks fulfil the same function in relation to services. Services may be of any kind, such as financial, banking, travel, advertising or catering, to name a few. Service marks can be registered, renewed, cancelled, assigned and licensed under the same conditions as trademarks.



Example

Uchumi is a registered Service mark of Uchumi supermarkets Ltd

What are collective marks?

A **collective mark** is owned by an association or a cooperative whose members may use the collective mark to market their products. The association generally establishes a set of criteria for using the collective mark e.g., quality standards and provides individual companies the choice to use the mark if they comply with such standards.

Collective marks may be an effective way of jointly marketing the products of a group of enterprises, which may individually find it more difficult to make their individual marks recognized by consumers and/or to be accepted for distribution by the main distributors. Applicants are generally required to submit the regulations governing the use of the collective mark together with the application.

For Example if the handicraft dealers were to have a single trademark to be used by any group to market their products which are of the same quality, standard or specification etc that mark would be considered a collective mark.

What are certification marks?

Certification marks are given for compliance with defined standards, but are not confined to any membership. They may be used by anyone who can certify that the products involved meet certain established standards. The main difference between collective marks and certification marks is that the former may only be used by a specific group of enterprises, e.g., members of an association, while certification marks may be used by anybody who complies with the standards defined by the owner of the certification mark.

An important requirement for certification marks is that the entity which applies for registration is considered “competent to certify” the products concerned.

Example: The Kenya Bureau of Standard may apply for registration of their “diamond symbol of quality” as a certification mark. The “diamond symbol” is a quality assurance symbol denoting that the products on which it is applied

comply with strict performance specifications set down by Kenya Bureau of Standards.



“KBS” and device is a registered mark of Kenya Bureau of Standards

What are well-known marks?

Being a member of the World Trade Organization, Kenya was required to provide legal protection for well-known marks. In August 2002 the Trademarks Act was amended to provide for well-known marks. “Well-known marks” are marks that are considered to be well-known by the competent authority of the country where protection for the mark is sought. Well-known marks generally benefit from stronger protection. For example, well-known marks will be protected even if they are not registered (or have not even been used) in a given territory. In addition, while marks are generally protected against confusingly similar marks only if used for *identical or similar* products, well-known marks are often protected against confusingly similar marks for even *unrelated* products, if certain conditions are met. The main purpose of this stronger protection is to prevent companies from free riding on the reputation of a well-known mark and/or causing damage to its reputation and goodwill.

Example: Let us assume that WONDERCOLA is the famous trademark of a soft drink. Wondercola Limited would then benefit from automatic protection in

those countries where well-known marks enjoy a stronger protection and where the mark is well known for soft drinks. The protection would also be available for unrelated goods and services, if certain conditions are met. That is to say, that if another company decides to market other products, ranging from T-shirts to sunglasses, using the WONDERCOLA mark, it will have to seek the authorization of Wondercola Limited or risk being sued for infringement.

4. Using your Trademark

Can you register a trademark without having used it?

In Kenya, it is not a requirement to use a mark before application for registration. The prescribed application Form TM2 provides for a mark that is being used or for application of a mark where the proprietor is proposing to use the mark. You may therefore safely apply for registration of a mark before you use it. However, under the Act, a trademark that has not been used for up to the date one month before the date of the application for a continuous period of five (5) years may be taken off the register. This usually happens in cases where a person applies to register a certain mark but the Registrar objects to the registration citing a registered mark. The applicant then brings expungement proceedings before the Registrar requesting the latter to remove the registered mark from the register citing non-use for a continuous period of five (5) years since registration. After hearing both parties, the Registrar then makes his ruling accordingly, which is subject to

appeal in the high court and the court of appeal.

TM or ®?

The use of ®, TM, SM or equivalent symbols next to your trademark is not a requirement and generally provides no further legal protection. Nevertheless, it may be a convenient way of informing others that a given sign is a trade mark, thus warning possible infringers and counterfeiters. The ® symbol is used once the trade mark has been registered, whereas TM denotes that a given sign is a trademark; SM is sometimes used for service marks. Under the Act, if you filed an application bearing the ® symbol, TM or SM, the Registrar would object to the registration of the mark. The application should also not contain words like “patent” or “patented”.

How should you use your trade mark in advertising?

If your mark is registered as a device with a specific design or font, make sure that, as far as possible, you use the mark as it is registered. Note that even a slight misrepresentation of a trademark in advertising may prove disastrous to the value of trademark in the longrun. Monitor its use closely as it is crucial for the image of your company's products. It is also important to avoid using the trademark as a verb or noun so that it does not come to be perceived by consumers as a generic term. Some marks in the Kenyan market are becoming generic. This is the case mostly with consumers who are not well informed. For example, when one wants to buy a detergent, he/she asks for **OMO** but

ends up buying any other brand of detergent. Similarly, a shopper who wants to buy cooking fat, asks for **KIMBO** but ends up buying the brand of cooking fat that the shopkeeper chooses. The same case applies to **JOGOO** for maize meal and **ROYKO** for food additives.

Can your company use the same trademark for different products?

Different trademarks may be used for different lines of products of a company. Depending on its branding strategy, each company will decide whether to use the same trademark for its products, extending the brand every time a new product is released, or to use a different mark for each line of products.

Extending an existing brand to new products enables the new product to benefit from the existing image and reputation of the mark. However, the use of a new mark, more specific and relevant to the new product, may also prove advantageous and enable the company to target the new product to a specific customer group (e.g. children, teenagers, etc) or to create a specific image for the new product line. Many companies also choose to use a new brand in conjunction with an existing brand. For example, Unilever Plc in Kenya has always used SUNLIGHT for laundry soap.



Recently, Unilever Plc launched a new detergent into the Kenyan market also called SUNLIGHT.



Different companies adopt different strategies. Whatever your choice, you should make sure that your trademark is registered for all categories of goods and/or services for which it is, or will be, used.

What should you keep in mind when using your trademark on the Internet?

The use of trademarks on the Internet has raised a number of controversial legal problems with no easy or uniform solution. One major problem stems from the fact that trademark rights are territorial (that is, they are only protected in the country or region where the mark has been registered or used), whereas the reach of the Internet is global. This creates problems when it comes to settling disputes between persons or companies legitimately owning identical or confusingly similar trademarks for identical or similar goods or services in different countries. Legislation in this area is still largely developing and different countries may treat the issue differently.



What is a domain name and how does it relate to trademarks?

A second important problem concerns the conflict between trademarks and **domain names**. Domain names are Internet addresses, and are commonly used to find web sites. For example, the domain name 'kipo.ke.wipo.net' is used to locate the KIPI web site at <http://www.kipo.ke.wipo.net>. Over time, domain names have come to constitute business identifiers thus coming to conflict with trademarks.

Therefore, it is important that you pick a domain name, which is not the trademark of another company, particularly a well-known trademark. This is because many national laws or courts treat registration of the trademark of another company or person as a domain name as trademark infringement, popularly known as “cyber squatting”. If this happens, then, your business may not only have to transfer or cancel the domain name, but may also have to pay damages or a heavy fine.

In order to find out whether a particular trademark is already protected, you can directly contact the trademarks Registry. Many other national or regional trademark offices operate Internet-searchable trademark *databases*. *A list of such databases is available on WIPO's web sites at <http://arbiter.wipo.int/trademark/output.html>.*

On the other hand, if your trademark is being used or “cyber squatted” by another individual or company then you may take

action to stop such misuse/infringement of your rights. In such case, one option would be to use WIPO's very popular on-line administrative procedure for domain name dispute resolution at: <http://arbiter.wipo.int/domains/>. This WIPO web site includes a model complaint as well as a legal index to the thousands of WIPO domain name cases that have already been decided.

Can you license your trademark to other companies?

Trademarks can be licensed to other companies. Under the Act, the Registrar is mandated to register licence agreements, which are referred to as “Registered user Agreements”. However, there is a proposal to amend The Act to replace the term “Registered user Agreements” with licence Agreements to conform to the trend all over the world. In such cases, the trademark owner retains ownership and merely agrees on the use of the trademark by one or more other companies. This is usually done on the basis of the payment of royalties and involves the consent of the trademark owner, which is usually specified in a formal licensing agreement³. Depending on the nature of the agreement, the licensor often retains some degree of control over the licensee to guarantee that a certain quality is maintained.

In practice, trademark licenses are frequently granted within broader licensing agreements, e.g., franchising agreements or agreements including the licensing of

³ A license agreement is a legal binding contract establishing partnership between an intellectual property rights owner (licensor) and another who is authorized to use such rights (licensee) in exchange for an agreed payment (fee or royalty).

other intellectual property rights such as patents, know-how and some degree of technical assistance for the production of a given product.

What does a franchising agreement have to do with trademarks?

Licensing of a trademark is usually a main condition of the franchising agreement. In franchising agreements the degree of control of the trademark owner over the franchisee is generally greater than is the case for standard trademark licensing agreements. In the case of franchising, the franchisor allows another person (the franchisee) to use his way of doing business (including trademarks, know-how, customer service, software, shop decoration, etc) in accordance with a set of prescriptions and in exchange for compensation or royalty.

Example: A restaurant selling chicken meals operates under the trademark NANDO'S. It has developed a system for preparing and selling these products, which are sold in large volumes and in a uniform manner. The system includes various factors that contribute to the success of NANDO'S restaurants, including recipes and methods of preparing meals that produce a product of consistent quality, the design of employees' uniforms, the design of the buildings, the design of packaging, and management and accounting systems. NANDO'S imparts its knowledge and experience to its franchisees and retains the right to supervise and control local franchisees. As a crucial component of the franchising agreement the franchisees will also be authorized and obliged to use

the NANDO'S trademark.



Courtesy: Nando's Group Holdings Ltd

Is there any restriction in selling or assigning your trademark to another company?

It is increasingly possible to sell or assign a trademark independently from the business that currently owns it. In cases of sale or assignment of a trademark, one is required to deposit a copy of the agreement or parts of it at the trademark registry. Recently, Unilever Plc assigned/sold its house hold trademark KIMBO to Bidco Oil Refineries limited, a transaction that was registered at the Registry.

Do you need to register all small modifications to your trademark?

Many trademarks, including some of the most famous trademarks, have slightly changed or evolved over the years in order to modernize the image of a company or adapt to new advertising media. Marks may be changed or adapted, but your company will have to be careful and consult with the trademark registry or a competent trademark agent as to whether a specific change will require the submission of a new application and payment of the relevant fees. For example, Unilever Plc recently amended their mark, "ROIKO" to

“ROYCO”. The company has since then registered the new mark.

(Omo to replace royco.)

5. Enforcing your Trademark

What should you do if your trademark is being used by others without authorization?

The burden of enforcing a trademark is mainly on the trademark owner. It is up to you as a trademark owner to identify any infringement, to decide what measures should be taken and to enforce trademark rights.

It is always useful to seek expert advice if you believe that someone is infringing your trademark. An intellectual property lawyer would be the right person to give you information on the existing measures in the country and, presumably, also in neighbouring countries to institute action against counterfeiting and infringement and will provide you advice on how to enforce your rights. You may also seek advice from the Trademarks Registry. The Government has established an advisory committee on anti-dumping and counterfeiting measures that would also assist a proprietor where a registered trademark is being infringed. KIPi is a member of this committee.

If you are faced with **infringement**, then you may choose to begin by sending a letter (commonly known as a “cease and desist letter”) to the alleged infringer informing him/her of the possible existence of a conflict between your trademark and his/her business activity. In writing such a letter, the assistance of a trademark attorney is recommended.

Under the Act, it is a criminal offence to infringe upon a registered trademark.

If you consider the infringement to be **wilful** and know the location of the infringing activity, then you may wish to take surprise action by obtaining, with the help of a trademark attorney, a search and seize order (usually, from a competent court or the police) to conduct a raid without prior notice to the alleged offender.

The infringer may be compelled by the judicial authorities to inform you of the identity of persons involved in the production and distribution of the infringing goods or services and their channels of distribution. As an effective deterrent to infringement, the judicial authorities may order, upon your request, that infringing goods and materials be destroyed or disposed of outside the channels of commerce without compensation of any sort.

In order to prevent the **importation of counterfeit trademark goods**, measures at the international border are available to the trademark owner in Kenya through the Kenya Revenue Authority. As a trademark owner, it is easier to deal with the infringing goods at the entry point than to deal with many infringers once the goods have been distributed in the country

In some instances, an effective way of dealing with infringement is through arbitration or mediation. Arbitration generally has the advantage of being a less formal, shorter, and cheaper procedure than court proceedings, and an arbitral award is more easily enforceable internationally. An advantage of mediation is that the parties retain control of the dispute resolution process. As such, it can help to preserve good business relations with another enterprise with which you may like to collaborate in the future.

Useful web sites for further information:

On other intellectual property issues from a business perspective:

www.wipo.int/sme/

On trademarks generally:

- “About IP” at the WIPO web site: <http://www.int/about-ip/en/>
- International Trademark Association: <http://www.inta.org>
- Association of European Trademark Owners: <http://www.marques.org/>

On practical aspects relating to the registration of marks, see list of web sites of national and regional trademark offices available in Annex I or http://www.wipo.int/news/en/links/ipo_web.htm.

On the Madrid System for the International Registration of Marks:

<http://www.wipo.int/madrid/en/index.html>

For a list of on-line trade mark databases maintained by industrial property offices throughout the world: <http://arbiter.wipo.int/trademark/output.html>

On the International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement:

<http://www.wipo.int/classifications/en/index.html> (under Nice Agreement)

On the International Classification of the Figurative Elements of Marks under the Vienna Agreement:

<http://www.wipo.int/classifications/en/index.html> (under Vienna Agreement)

On the conflict between trademarks and domain names:

<http://arbiter.wipo.int/domains/index.html>
www.icann.org

On alternative dispute resolution procedures for domain names:

<http://arbiter.wipo.int/domains/>

ANNEX I

Web site Addresses of National and Regional Trade mark Offices			
Andorra	http://www.ompaa.ad	Estonia	http://www.epa.ee
Argentina	http://www.inpi.gov.ar/	Europe (Office for the Harmonization in the Internal Market - OHIM)	http://oami.eu.int/
ARIPO (African Regional Industrial Property Organization)	http://www.aripo.wipo.net/	Finland	http://www.finlex.fi
Armenia	http://www.armpatent.org	France	http://www.inpi.fr
Austria	http://www.patent.bmwg.gv.at/	Georgia	http://www.sakpatenti.org.ge/
Australia	http://www.ipaustralia.gov.au/	Germany	http://www.dpma.de
Benelux (Benelux Trade marks Office - BTO)	http://www.bmb-bbm.org/	Hungary	http://www.hpo.hu/
Bolivia	http://www.senapi.gov.bo	Iceland	http://www.els.stjr.is
Brazil	http://www.inpi.gov.br	India	http://www.patentoffice.nic.in
Bulgaria	http://www.bpo.bg/	Ireland	http://www.patentsoffice.ie
Canada	http://opic.gc.ca	Italy	http://www.european-patent-office.org/it/
		Kenya	http://www.kipo.ke.wipo.net
China (Marks)	http://www.saic.gov.cn	Lithuania	http://www.vpb.lt/
China (Hong Kong -SAR)	http://www.info.gov.hk/ipd	Luxembourg	http://www.etat.lu/ec/
China: Macao (SAR)	http://www.economia.gov.mo	Mexico	http://www.impi.gob.mx
Chile	http://www.proind.gov.cl	Morocco	http://www.ompic.org.ma/
Colombia	http://www.sic.gov.co	New Zealand	http://www.iponz.govt.nz
Costa Rica	http://www.registracional.go.cr	Norway	http://www.patentstyret.no
Democratic People's Republic of Korea	http://www.epa.ee	OAPI (Organisation Africaine de la Propriété Intellectuelle)	http://www.oapi.wipo.net/
Denmark	http://www.dkpto.dk/	Peru	http://www.indecopi.gob.pe/
Dominican Republic	http://www.seic.gov.do/onapi/	Philippines	http://www.ipophil.gov.ph/
El Salvador	http://www.cnr.gob.sv	Poland	http://www.uprp.pl/
Portugal	http://www.inpi.pt/	Slovenia	http://www.uil-sipo.si/
Republic of Macedonia	http://www.ippo.gov.mk/	Spain	http://www.oepm.es
Republic of Moldova	http://www.agepi.md/	Sweden	http://www.prv.se
Romania	http://www.osim.ro	Turkey	http://www.turkpatent.gov.tr
Russian Federation	http://www.rupto.ru	Uruguay	http://www.dnpi.gub.uy
Serbia and Montenegro	http://yupat.sv.gov.yu	United States	http://www.uspto.gov
Singapore	http://www.ipos.gov.sg	Venezuela	http://www.sapi.gov.ve

ANNEX II

International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement

GOODS

Class	Goods
1.	Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; unprocessed artificial resins, unprocessed plastics; manures; fire extinguishing compositions; tempering and soldering preparations; chemical substances for preserving foodstuffs; tanning substances; adhesives used in industry.
2.	Paints, varnishes, lacquers; preservatives against rust and against deterioration of wood; colorants; mordents; raw natural resins; metals in foil and powder form for painters, decorators, printers and artists.
3.	Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrice.
4.	Industrial oils and greases; lubricants; dust absorbing, wetting and binding compositions; fuels (including motor spirit) and illuminants; candles and wicks for lighting.
5.	Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.
6.	Common metals and their alloys; metal building materials; transportable buildings of metal; materials of metal for railway tracks; non-electric cables and wires of common metal; ironmongery, small items of metal hardware; pipes and tubes of metal; safes; goods of common metal not included in other classes; ores.
7.	Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); agricultural implements other than hand-operated; incubators for eggs.
8.	Hand tools and implements (hand-operated); cutlery; side arms; razors.
9.	Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus.
10.	Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopedic articles; suture materials.
11.	Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes.
12.	Vehicles; apparatus for locomotion by land, air or water.
13.	Firearms; ammunition and projectiles; explosives; fireworks.
14.	Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewellery, precious stones; horological and chronometric instruments.

15.	Musical instruments.
16.	Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks.
17.	Rubber, gutta-percha, gum, asbestos, mica and goods made from these materials and not included in other classes; plastics in extruded form for use in manufacture; packing, stopping and insulating materials; flexible pipes, not of metal.
18.	Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.
19.	Building materials (non-metallic); non-metallic rigid pipes for building; asphalt, pitch and bitumen; non-metallic transportable buildings; monuments, not of metal.
20.	Furniture, mirrors, picture frames; goods (not included in other classes) of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics.
21.	Household or kitchen utensils and containers (not of precious metal or coated therewith); combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes; steel wool; un-worked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware not included in other classes.
22.	Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes); padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials.
23.	Yarns and threads, for textile use.
24.	Textiles and textile goods, not included in other classes; bed and table covers.
25.	Clothing, footwear, headgear.
26.	Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers.
27.	Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile).
28.	Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees.
29.	Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats.
30.	Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice.
31.	Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt.
32.	Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.
33.	Alcoholic beverages (except beers).
34.	Tobacco; smokers' articles; matches.

SERVICES

35.	Advertising; business management; business administration; office functions.
36.	Insurance; financial affairs; monetary affairs; real estate affairs.
37.	Building construction; repair; installation services.
38.	Telecommunications.
39.	Transport; packaging and storage of goods; travel arrangement.
40.	Treatment of materials.
41.	Education; providing of training; entertainment; sporting and cultural activities.
42.	Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; legal services.
43.	Services for providing food and drink; temporary accommodation.
44.	Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services.
45.	Personal and social services rendered by others to meet the needs of individuals; security services for the protection of property and individuals.

In November 2002, 70 States were party to the Nice Agreement. They have adopted and apply the Nice Classification for the purposes of the registration of marks.

ANNEX III

Members of the Madrid Union

Albania (A)	Liberia (A)
Algeria (A)	Liechtenstein (A&P)
Antigua and Barbuda (P)	Lithuania (P)
Armenia (A&P)	Luxembourg* (A&P)
Australia (P)	Monaco (A&P)
Austria (A&P)	Mongolia (A&P)
Azerbaijan (A)	Morocco (A&P)
Belarus (A&P ¹)	Mozambique (A&P)
Belgium* (A&P)	Netherlands* (A&P)
Bhutan (A&P)	Norway (P)
Bosnia and Herzegovina (A)	Poland (A&P)
Bulgaria (A&P)	Portugal (A&P)
China (A&P)	Republic of Moldova (A&P)
Croatia (A)	Romania (A&P)
Cuba (A&P)	Russian Federation (A&P)
Czech Republic (A&P)	San Marino (A)
Democratic People's Republic of Korea (A&P)	Sierra Leone (A&P)
Denmark (P)	Singapore (P)
Egypt (A)	Slovakia (A&P)
Estonia (P)	Slovenia (A&P)
Finland (P)	Spain (A&P)
France (A&P)	Sudan (A)
Georgia (P)	Swaziland (A&P)
Germany (A&P)	Sweden (P)
Greece (P)	Switzerland (A&P)
Hungary (A&P)	Tajikistan (A)
Iceland (P)	The former Yugoslav Republic of Macedonia (A)
Ireland (P)	Turkey (P)
Italy (A&P)	Turkmenistan (P)
Japan (P)	Ukraine (A&P)
Kazakhstan (A)	United Kingdom (P)
Kenya (A&P)	Uzbekistan (A)
Kyrgyzstan (A)	Viet Nam (A)
Latvia (A&P)	Yugoslavia (A&P)
Lesotho (A&P)	Zambia (P)

(A) indicates a party to the Agreement (52)

(P) indicates a party to the Protocol (55)

- Protection may not be requested separately for Belgium, Luxembourg or the Netherlands, but only for all three countries as a whole (Benelux), subject to payment of a single complementary or individual fee.

Disclaimer: The information contained in this guide is not meant as a substitute for professional legal advice. Its main purpose is limited to providing basic information on trade and service marks.

This publication is the nationally customized version of the WIPO publication entitled “Making a mark: An introduction to Trade marks for Small and medium- Sized Enterprises”

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