

Malawi

## Merchandise Marks Act

Chapter 49:04

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## Merchandise Marks Act

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# Malawi

## Merchandise Marks Act

### Chapter 49:04

Commenced on 7 March 1958

*[This is the version of this document at 31 December 2014.]*

*[Note: This version of the Act was revised and consolidated in the Fifth Revised Edition of the Laws of Malawi (L.R.O. 1/2018), by the Solicitor General and Secretary for Justice under the authority of the Revision of the Laws Act.]*

**An Act to provide for the marking of goods for the prohibition, of the use of certain emblems and for matters incidental thereto**

### Preliminary

#### 1. Short title

This Act may be cited as the Merchandise Marks Act.

#### 2. Interpretation

In this Act, unless inconsistent with the context—

“**apply to**” means to emboss, impress, engrave, etch or print upon, weave or otherwise work into or annex or affix to, and cognate expressions shall be construed accordingly;

“**bottle**” means a bottle made of glass, earthenware or plastic material;

“**covering**” includes any stopper, cask, bottle, vessel, box, cover, wrapper, capsule, case, frame or container;

“**customs officer**” means any officer of the Department of Customs and Excise and any other person appointed by the Controller of Customs and Excise for the discharge of any duties in connexion with the administration of the Customs and Excise Act;

*[Cap. 42:01]*

“**false trade description**” means a trade description which is false in a material respect as regards the goods to which it is applied and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description false or misleading in a material respect and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act;

“**goods**” means anything which is the subject of trade, manufacture or merchandise;

“**goods assembled externally**” means goods assembled in any country outside Malawi;

“**goods manufactured externally**” means goods manufactured, made or produced in any country outside Malawi;

“**goods mixed externally**” means goods the ingredients of which have been mixed in any country outside Malawi and were manufactured, made or produced in—

- (a) a country other than the country in which they were mixed; or
- (b) more than one country;

“**inspector**” means an inspector appointed under [section 19](#);

“**label**” includes any band or ticket;

“**mix**” includes blend and cognate expressions shall be construed accordingly;

“**name**” includes any abbreviation of or addition to a name;

“**offending mark**” means—

- (a) in relation to goods manufactured externally, goods assembled externally or goods mixed externally—
  - (i) a mark applied to those goods containing any name being or purporting to be the name of any manufacturer, producer, trader, assembler or mixer in Malawi or the name of any town, place or District in Malawi; or
  - (ii) a trade mark or trade description applied to those goods containing—
    - (A) a direct or indirect reference to any town, place or district outside Malawi; or
    - (B) a direct or indirect reference (other than the name of a country applied to those goods so as to indicate that they were manufactured, produced, assembled or mixed in that country) to a country outside Malawi;
- (b) in relation to goods manufactured, made, produced, assembled or mixed in Malawi a trade mark or trade description applied to those goods containing a direct or indirect reference to any town, place, district or country outside Malawi;

“**police officer**” means a member of the Malawi Police Force of or above the rank of Inspector;

“**sell**” includes to expose for sale or have in possession for the purpose of sale or for any purpose of trade or commerce, and cognate expressions shall be construed accordingly;

“**trade description**” means any description, statement or other indication, direct or indirect, as to—

- (a) the number, quantity, measure, gauge or weight of any goods; or
- (b) the standard of quality of any goods, according to a classification commonly used or recognized in the trade; or
- (c) the name of the manufacturer, producer, assembler or mixer of any goods; or
- (d) the place or country in which any goods were manufactured, made, produced, assembled or mixed; or
- (e) the fitness for purpose, strength, performance or behaviour of any goods; or
- (f) the mode of manufacturing, producing, assembling or mixing of any goods; or
- (g) the material of which any goods are composed; or
- (h) the fact of any goods being the subject of an existing patent, privilege or copyright;

and the use of any figure, word or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act;

“**trade mark**” means a mark which is used upon or in connexion with goods for the purpose of indicating that they are, by virtue of manufacture, production, selection, certification, dealing with or offering for sale, the goods of the proprietor or of a person who is, in terms of any enactment in force within Malawi, the registered user thereof.

## **Part I – Application of trade marks and trade descriptions**

### **3. Application of trade marks and trade descriptions**

- (1) A person shall be deemed to apply a trade mark or trade description to goods if he—
  - (a) applies it to the goods themselves; or
  - (b) applies it to any covering, label, reel or other thing in or attached to which the goods are sold; or
  - (c) places, encloses or annexes the goods which are sold in, with or to any covering, label, reel or other thing to which a trade mark or trade description has been applied; or
  - (d) uses a trade mark or trade description in any manner so as to be likely to lead to the belief that the goods in connexion with which it is used are designated or described by that trade mark or trade description.
- (2) Goods delivered in pursuance of an offer or request made by reference to a trade mark or trade description appearing in any sign, advertisement, invoice, wine list, business letter, business paper or other commercial communication shall, for the purposes of subsection (1) (d), be deemed to be goods in connexion with which the trade mark or trade description is used.
- (3) A person shall be deemed falsely to apply to goods a trademark who, without the consent of the proprietor or of any person who is, in terms of any enactment in force within Malawi, the registered user thereof, applies to the goods that trade mark or a mark so nearly resembling it as to be likely to deceive.
- (4) Any person who applies to goods any word, name, letter, figure or mark, or arrangement or combination thereof, whether constituting of or including a trade mark or part of a trade mark or not, which is likely to lead to the belief that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are, shall be deemed to apply a false trade description to the goods.

## **Part II – Marking of goods and prohibitions in relation to trade marks and trade descriptions**

### **4. Certain acts deemed to be a forgery of a trade mark**

A person shall be deemed to forge a trade mark if he—

- (a) without the consent of the proprietor of the trade mark, makes that trade mark or a mark so nearly resembling that trade mark as to be likely to deceive; or
  - (b) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise;
- and any trade mark so made or falsified is in this Act referred to as a forged trade mark.

### **5. Forgery of trade marks and other acts prohibited**

- (1) No person shall—
  - (a) forge any trade mark; or
  - (b) make any die, block, machine or other instrument for the purpose of forging or of being used for forging a trade mark; or
  - (c) dispose of or have in his possession any die, block, machine or other instrument for the purpose of forging a trade mark; or

- (d) falsely apply to goods any trade mark or a mark so nearly resembling a trade mark as to be likely to deceive; or
  - (e) without the consent of the proprietor of a trade mark, make, import or have in his possession any device for applying that trade mark to goods or make any reproductions, replicas or representations of that trade mark or import them otherwise than on goods to which they have been applied for the purpose of applying them contrary to this Act; or
  - (f) make, import or have in his possession any device for applying to any goods a mark so nearly resembling a trade mark as to be likely to deceive; or
  - (g) make, import or have in his possession any coverings, labels, reels or any reproductions, replicas or representations of a trade mark or a mark so nearly resembling a trade mark as to be likely to deceive for the purpose of applying them to goods contrary to this Act; or
  - (h) apply any false trade description to goods.
- (2) It shall be a sufficient defence to any charge under subsection (1) if the accused satisfies the court that he acted without intent to defraud.
- (3) In any prosecution for a contravention of subsection (1) (b), (d) or (h), it shall be a sufficient defence if the accused satisfies the court that—
- (a) in the ordinary course of his business he was employed, on behalf of other persons, either to make dies, blocks, machines or other instruments for making or being used in making trade marks, or, as the case may be, to apply trade marks or trade descriptions to goods and that in the case which is the subject of the charge he was so employed by some other person and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and
  - (b) he took reasonable precautions against committing the offence charged; and
  - (c) he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark or trade description; and
  - (d) on request made by an inspector, police officer or customs officer, he gave to such inspector or such officer all the information in his power with respect to the persons on whose behalf the trade mark or trade description was applied.

## **6. Prohibition of sale of goods bearing forged trade mark or false trade description**

- (1) No person shall sell any goods—
- (a) to which any forged trade mark or false trade description is applied; or
  - (b) to which any trade mark or a mark so nearly resembling a trade mark as to be likely to deceive is falsely applied.
- (2) It shall be a sufficient defence to any charge under subsection (1) if the accused satisfies the court that—
- (a) having taken all reasonable precautions against committing an offence against this Act, he had at the time of the sale no reason to suspect the genuineness of the trade mark or trade description and, on request made by an inspector, police officer or customs officer, he gave to such inspector or such officer all the information in his power with respect to the persons from whom he obtained such goods; or
  - (b) otherwise he had acted innocently.

## 7. Prohibition of sale of imported goods unless accompanied by indication of origin

- (1) Subject to subsection (2), no person shall sell or for the purpose of advertising goods distribute any goods manufactured externally, any goods assembled externally or any goods mixed externally or samples of such goods to which there is applied an offending mark unless there is also applied to those goods in the manner specified in [section 10](#) the name of the country in which those goods were manufactured, assembled or mixed so as to indicate that those goods were manufactured, assembled or mixed, as the case may be, in that country.
- (2) This section shall not have effect in respect of the application of a name or trade mark to—
  - (a) parts or materials of a type suitable only for consumption in a process of manufacture; or
  - (b) articles to be used as coverings, labels or reels or to articles in or with which goods manufactured, made, produced, assembled or mixed in Malawi are to be sold,if the name or trade mark so applied is the name or trade mark of a manufacturer, producer, assembler mixer of or trader in those goods in Malawi and the name or trade mark is applied with his consent.
- (3) The Minister may, by notice published in the *Gazette*, suspend, in relation to any goods or class of goods, the operation of subsection (1).

## 8. Prohibition of sale of goods, whether made in Malawi or elsewhere, unless accompanied by indication of origin

- (1) No person shall sell or for the purpose of advertising goods distribute in Malawi any goods manufactured, made, produced, assembled or mixed in Malawi or samples of such goods to which there is applied an offending mark unless there is also applied to those goods in the manner specified in [section 10](#) the name of Malawi so as to indicate that those goods were manufactured, made, produced, assembled or mixed, as the case may be, in Malawi.
- (2) The Minister may, by notice published in the *Gazette*, suspend, in relation to any goods or class of goods the operation of subsection (1).

## 9. Importation of certain goods prohibited

No person shall import into Malawi any goods—

- (a) to which any forged trade mark or false trade description is applied or to which any trade mark or a mark so nearly resembling a trade mark as to be likely to deceive is falsely applied; or
- (b) which it would be an offence to sell or distribute in terms of [section 7](#) or [8](#).

## 10. Manner of application of mark

- (1) Whenever the name of the country in which goods were manufactured, made, produced, assembled or mixed is applied to goods for the purposes of [section 7](#) or [8](#) that name shall be applied in a conspicuous manner—
  - (a)
    - (i) in the case where an offending mark is applied to the goods themselves, to the goods themselves; or
    - (ii) in the case where an offending mark is applied to any covering, label or other attachment, either by means of such covering, label or other attachment or to the goods themselves;
  - (b) so as to render unlikely the obliteration, erasure or detachment of such name in the ordinary course of handling prior to sale to the consumer; and

- (c) in a prominent position and so placed that it can be easily read without detaching or unwrapping any part of the covering in which the goods may be offered for sale, or wherever an offending mark is applied.
- (2) Notwithstanding subsection (1), the Minister may by notice published in the *Gazette* and for the purposes of sections 7 and 8 prescribe in respect of goods specified in such notice the manner in which the name of the country shall be applied and in that event subsection (1) shall not apply in relation to those goods.

## 11. Marking of goods on importation

- (1) If the import of any goods into Malawi is prohibited in terms of section 9 (b), the Controller of Customs, after—
  - (a) being furnished by the importer thereof with proof of the country in which the goods were manufactured, made, produced, assembled or mixed; and
  - (b) being satisfied that the goods are capable of being marked so as to comply with the requirements of section 7 or 8 as the case may be,may, within such time as he may specify, permit the importer of the goods to mark them so as to comply with such requirements.
- (2) If the goods are marked within the time specified in terms of subsection (1) to the satisfaction of the Controller of Customs and Excise, such goods may, notwithstanding section 21 of the Customs and Excise Act, be imported into Malawi.

## 12. Removal of indication of origin from imported goods prohibited

- (1) No person shall remove, alter or obliterate an indication of origin applied to goods in accordance with section 7, 8 or 11.
- (2) It shall be a sufficient to any charge under subsection (1) if the accused satisfies the court that the removal, alteration or obliteration was not made for the purpose of concealing the origin of the goods at the time of sale.

## 13. Indication of origin and compliance with specified standards in the case of certain classes of goods

The Minister may, after such investigation as he thinks fit, by notice published in the *Gazette*, prohibit the importation for sale or the sale of goods of any class or description, unless all or any of the following requirements, as specified in such notice, have been complied with—

- (a) there are applied to the goods words stating clearly the country in which they were manufactured, made, produced, assembled or mixed and such words are applied in such manner as may be specified in the notice or, if no manner is specified, in a conspicuous manner;
- (b) the goods bear such mark as may be specified in the notice and conform to such standard as may be prescribed in the notice;
- (c) there are applied to the goods in a conspicuous manner and as specified in the notice words or letters stating clearly the materials of which they are composed and, if so specified in the notice, the percentages of such materials calculated either by weight or by volume;
- (d) there are applied to second-hand goods which have been reconditioned, rebuilt or remade, whether in Malawi or elsewhere, in the manner specified in the notice, words stating clearly that they have been reconditioned, rebuilt or remade, as the case may be;



- (e) in the case of goods to which there is applied any number which, in the opinion of the Minister, is likely to lead to the belief that such number refers to a unit of quantity, measure, gauge, or weight, there are added words stating clearly to what such number refers.

#### **14. Indication of origin of certain goods may be prescribed**

If the Minister, after such investigation as he thinks fit, is satisfied, in the case of goods of any class or description which are made or produced in one country, that—

- (a) such goods—
  - (i) have undergone in another country any treatment or process resulting in a substantial change in the goods;
  - (ii) have had a considerable part of the labour expended in the manufacture or production of such goods expended in another country; or
  - (iii) are largely composed of materials made or produced in another country; and
- (b) it is desirable that disclosure be made with respect to such goods of the facts referred to in paragraph (a) (i), (ii) or (iii),

he may by notice published in the *Gazette* prohibit the importation for sale or the sale of such goods, unless there are applied to them in a conspicuous manner words specified in the notice making disclosure of the facts referred to concerning such goods.

#### **15. Use of certain marks may be prohibited**

The Minister may, after such investigation as he thinks fit, by notice published in the *Gazette* prohibit, either absolutely or conditionally, the application to goods of any mark, word, letter or figure or of any arrangement or combination thereof.

#### **16. Submission of representations by interested persons**

Before the Minister issues any notice under section [13](#), [14](#) or [15](#), he shall, by notice published in the *Gazette*, invite representations on the matter within a period stated and take into consideration all representations so submitted.

### **Part III – Miscellaneous**

#### **17. Implied warranty on sale of marked goods**

Every person who sells any goods to which a trade mark or trade description has been applied shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied or that the trade description is not a false trade description, as the case may be, unless the contrary is expressed in writing signed by the seller or on his behalf and delivered at the time of the sale to and accepted by the purchaser.

#### **18. Sale of goods in bottles marked with owner's name**

No person shall sell in any bottle, to which or to the stopper of which have been indelibly applied words indicating that the bottle is the property of a named person, goods resembling or so nearly resembling goods manufactured or produced for sale in any such bottle by such named person as to be likely to deceive.

#### **19. Appointment of inspectors and powers of police officers and inspectors**

- (1) The Minister may appoint any person to be an inspector for the purposes of this Act.

- (2) Any inspector who produces a certificate of his appointment under subsection (1) or any police officer may, at any time during the hours when the premises are open for business, enter any premises on which he has reason to believe there are kept for sale any goods, whether imported into or manufactured in Malawi, and, on giving a receipt there for, may, without payment take and remove samples of any such goods for examination or inspection or for any other purpose relating to this Act.
- (3) A police officer or inspector taking a sample in terms of subsection (2) shall forthwith notify the person on whose premises the sample is taken, or his agent, that the sample is taken in pursuance of this Act and shall, if required so to do at the time of giving such notification, select a second like sample or, if practicable, divide the sample into two parts and mark and seal and leave with that person or agent either the second sample or one part of the divided sample.
- (4) Any sample taken by a police officer or inspector under the powers conferred upon him by subsection (3) shall, whenever possible, be returned by him to the person from whose premises it was removed or to his agent.
- (5) No person shall obstruct, police officer or inspector in the execution of the powers conferred upon such officer or such inspector by this section.

## 20. Evidence

- (1) Any invoice or other document submitted or used by an importer or any other person in connexion with the importation of goods in respect of which a prosecution is brought under this Act may be produced as evidence in any criminal proceedings without calling the person who prepared or signed it.
- (2) In any prosecution for an offence under the provisions of this Act, evidence that any imported goods were shipped at any port of call shall be *prima facie* evidence that those goods were made or produced in the country within which that port is situated.
- (3) Where, in any prosecution for a contravention of this Act, the consent of the proprietor of a trade mark is a relevant issue, the onus of proving the consent of such proprietor shall lie on the accused.

## 21. Aiding and abetting offences

No person shall within Malawi procure, counsel, aid, abet or be accessory to the commission outside Malawi of any act which, if committed in Malawi, would be an offence under this Act.

## 22. Limitation of prosecution

No prosecution for any offence under this Act shall be commenced after the expiration of a period of three years reckoned from the date on which the offence was alleged to have been committed or one year next after the first discovery thereof by an inspector, police officer, or customs officer, whichever expiration first happens.

## 23. Offences and penalties

Subject to this Act, any person who contravenes or fails to comply with any provision of this Act shall be liable—

- (a) on first conviction, to a fine of £100 and to imprisonment for one year;
- (b) on the second or any subsequent conviction, to a fine of £200 and to imprisonment for two years.

## 24. Forfeiture

- (1) Upon conviction of an offender under this Act, the judge or magistrate presiding at the trial may, in addition to passing sentence, declare any goods in respect of which the offence was

committed to be forfeited, unless the owner of the goods or any person acting on his behalf or other person interested in the goods shows cause to the contrary.

- (2) If any goods in respect or by means of which it is suspected that an offence under this Act has been committed are seized by a police officer under any law and taken before a magistrate, and, if no prosecution is instituted following that seizure, the magistrate shall, on application by a police officer, cause a notice to be published in the *Gazette* and in a newspaper circulating in his District stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods shall be declared forfeited.
- (3) At such time and place, the magistrate may, unless the owner of the goods or any person acting on his behalf or other person interested in the goods shows cause to the contrary, declare such goods to be forfeited.
- (4) Any goods declared to be forfeited under this section shall, without compensation, vest in the Government and may, by direction of the Minister of Finance, be sold or destroyed or appropriated to the Government.