CHAPTER 241

MERCHANDISE MARKS

Ordinances Nos. 20 of 1933, 2 of 1945, 37 of 1966

AN ACT RELATING TO THE FRAUDULENT MARKING OF MERCHANDISE

[25th July, 1933.]

Short title

1. This Act may be cited as the Merchandise Marks Act.

Interpretation

2.—(1) In this Act, unless the context otherwise requires—

“Comptroller” means the Comptroller of Customs and Excise;

“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 in a material respect and also every trade description so nearly resembling some other trade description as to be calculated to deceive, 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 or of trade manufacture or merchandise;

“name” includes any abbreviation of a name;

“person”, “manufacturer, dealer or trader” and “proprietor” include any body of persons corporate or unincorporate;

“trade-mark” includes any trade-mark which either with or without registration is protected by law in any country or territory of the Commonwealth or in any foreign state to which the provisions of section 91 of the Imperial Patents and Designs Act, 1907, are under Order in Council for the time being applicable; and

(Amended by 37 of 1966, s. 64.)

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

(a) the number, quantity, measure, gauge or weight of any goods; or

(b) the place or country in which any goods were made or produced; or

(c) the mode of manufacturing or producing any goods; or

(d) the material of which any goods are composed; or

(e) 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.
(2) The customs entry relating to imported goods shall, for the purposes of this Act, be deemed to be a trade description applied to the goods.

(3) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words or marks or arrangement or combination thereof, whether including a trade-mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandize of some person other than the person whose manufacture or merchandize they really are.

(4) The provisions of this Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purposes of this enactment, the expression “false name or initials” means, as applied to any goods, any name or initial of a person which—

(a) is not a trade-mark or part of a trade-mark; and

(b) is identical with or a colourable imitation of the name or initials of a person carrying on business in connexion with goods of the same description and not having authorised the use of such name or initials; and

(c) is either the name or initials of a fictitious person or the name or initials of some person not bona fide carrying on business in connexion with such goods.

3.—(1) Every person who—

(a) forges any trade-mark; or

(b) falsely applies to goods any trade-mark or any mark so nearly resembling a trade-mark as to be calculated to deceive; or

(c) makes any die, block, machine or other instrument for the purpose of forging or of being used for forging a trade-mark; or

(d) disposes of or has in his possession any die, block, machine or other instrument for the purpose of forging a trade-mark; or

(e) applies any false trade description to goods; or

(f) causes any of the things above in this section mentioned to be done, shall, subject to the provisions of this Act and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

(2) Every person who sells or exposes or has in his possession for sale or for any purpose of trade or manufacture any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves that—

(a) having taken all reasonable precautions against committing an offence against this Act 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

(b) on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the person or persons from whom he obtained such goods or things; or
(c) otherwise he acted innocently, be guilty of an offence against this Act.

(3) Every person guilty of an offence against this Act shall be liable to imprisonment for a term not exceeding two years or to a fine or to both imprisonment and a fine, and to forfeit to Her Majesty every chattel, article, instrument or thing by means of or in relation to which the offence was committed. 
(Substituted by 2 of 1945, s. 98, and amended by 37 of 1966, s. 64.)

Who to be deemed to forge a trade mark

4. A person shall be deemed to forge a trade-mark who either—
(a) without the assent of the proprietor of the trade-mark makes that trade-mark or a mark so nearly resembling that trade-mark as to be calculated to deceive; or
(b) falsifies any genuine trade-mark whether by alteration, addition, effacement or otherwise;
and any trade-mark or mark so made or falsified is in this Act referred to as a forged trade-mark:
Provided that in any prosecution for forging a trade-mark the burden of proving the assent of the proprietor shall lie on the defendant.

Who to be deemed to apply a trade-mark or trade description

5.—(1) A person shall be deemed to apply a trade-mark or mark or trade description to goods who—
(a) applies it to the goods themselves; or
(b) applies it to any covering, label, reel or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade or manufacture; or
(c) places, encloses or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade or manufacture in, with or to any covering, label, reel or other thing to which a trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive or trade description has been applied; or
(d) uses a trade-mark or mark or trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade-mark or mark or trade description.

(2) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper and the expression "label" includes any band or ticket.

(3) A trade-mark or mark or trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or into or to any covering, label, reel or other thing.

(4) A person shall be deemed falsely to apply to goods a trademark or mark who, without the assent of the proprietor of a trade-mark, applies to any goods such trade-mark or a mark so nearly resembling it as to be calculated to deceive, and, in any prosecution for falsely applying a trade-mark or mark to goods, the burden of proving the assent of the proprietor shall lie on the defendant.

As to persons employed in the ordinary course of business in making trade-mark dies, etc.

6. Where a defendant is charged with making any die, block, machine or other
instrument for the purpose of forging or being used for forging a trade-mark, or with falsely applying to goods any trade-mark or any mark so nearly resembling a trade-mark as to be calculated to deceive, or with applying to goods any false trade description or causing any of the things in this section mentioned to be done, and proves that—

(a) in the ordinary course of his business he is employed on behalf of other persons 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 marks or descriptions to goods, and that, in the case which is the subject of the charge, he was so employed by some person resident in Fiji 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, mark or trade description; and

(d) he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade-mark, mark or description was applied,

he shall be discharged from the prosecution but shall be liable to pay the costs incurred by the prosecutor unless he has given due notice to him that he will rely on the above defence.

Application of Act to watches

7. Where a watch-case has thereon any words or marks which constitute or are by common repute considered as constituting a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall, prima facie, be deemed to be a description of that country within the meaning of this Act and the provisions of this Act with respect to goods to which a false trade description has been applied and with respect to selling or exposing or having in possession for sale or any purpose of trade or manufacture goods with a false description shall apply accordingly, and, for the purposes of this section, the expression “watch” means all that portion of a watch which is not the watch-case.

Sufficiency of description of trademark in pleadings, etc.

8. In any information, pleading, proceeding or document in which any trademark or forged trade-mark is intended to be mentioned it shall be sufficient, without further description and without any copy or facsimile, to state that trademark or forged trade-mark to be a trade-mark or forged trade-mark.

Evidence

9. In any prosecution for an offence against this Act—

(a) a defendant and his wife or her husband as the case may be, may, if the defendant thinks fit, be called as a witness and, if called, shall be sworn and examined and may be cross-examined and re-examined in like manner as any other witness; and

(b) in the case of imported goods evidence of the port of shipment shall be prima facie evidence of the place or country in which the goods were made or produced.
10. Any person who, being in Fiji, procures, counsels, aids, abets or is accessory to the commission outside Fiji of any act which, if committed in Fiji, would under this Act be an offence, shall be guilty of that offence as a principal and be liable to be proceeded and informed against and tried and convicted in any part of or place in Fiji in which he may be as if the offence had been there committed.

Search warrants

11.—(1) Where upon complaint of an offence against this Act, a magistrate has issued either a summons requiring the defendant charged by such information to appear to answer to the same or a warrant for the arrest of such defendant and either the said magistrate on or after issuing the summons or warrant or any other magistrate is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant or otherwise in his possession or under his control in any place, such magistrate may issue a warrant under his hand by virtue of which it shall be lawful for any police officer named or included in such warrant to enter such house, premises or place at any reasonable time by day and to search therefor and seize and take away such goods and things, and any goods or things seized under any such warrant as last aforesaid shall be brought before a magistrate of the Division in which such goods or things are found for the purpose of determining whether the same are or are not liable to forfeiture under this Act.

Forfeiture in special cases

(2) If the owner of any goods or things which, if the owner or possessor thereof had been convicted under this Act, would be liable to forfeiture is unknown or cannot be found, a complaint may be laid for the purpose only of enforcing forfeiture of such goods or things and the magistrate of a Division in which such goods or things are found may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in such notice, such goods or things will be forfeited, and at such time and place the magistrate, unless the owner or some person on his behalf or other person interested in the goods or things show cause to the contrary, may order such goods or things or any of them to be forfeited.

Disposal of forfeited articles and compensation to innocent parties

(3) Any goods or things forfeited under this section or under any other provision of this Act may be destroyed or otherwise disposed of, all trade-marks and trade descriptions being first obliterated in such manner as the court by which the same are declared to be forfeited may direct, and the court may, out of any proceeds which may be realized by the disposition of such goods, award to any innocent party compensation for any loss that he may have sustained in dealing with such goods.

Costs

12. On any prosecution under this Act, the court may order costs to be paid to the defendant by the prosecutor or to the prosecutor by the defendant having
regard to the information given by and the conduct of the defendant and the prosecutor respectively.

Limitation of prosecutions

13. No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of such offence or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.

Appeals

14. A conviction or order by a magistrate under this Act shall be subject to appeal to the Supreme Court in the manner provided by the Criminal Procedure Code. (Substituted by 2 of 1945, s. 98.) (Cap. 21.)

Prohibition of importation of goods liable to forfeiture

15. In order to make provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Act—

(a) all such goods and also all goods of foreign manufacture bearing any name or trade-mark being or purporting to be the name or trade-mark of any manufacturer, dealer or trader in the United Kingdom, unless such name or trade-mark is accompanied by a definite indication of the country in which the goods were made or produced, are hereby prohibited to be imported into Fiji and shall be included among goods absolutely prohibited to be imported as if they were specified in that behalf in any Customs Act for the time being in force in Fiji;

(b) before detaining any such goods or taking any further proceedings with a view to the forfeiture thereof under the law relating to the customs, the Comptroller may require the regulations under this section, whether as to information, security, conditions or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the goods are such as are prohibited by this section to be imported;

(c) the Comptroller may from time to time make, revoke and vary regulations either general or special respecting the detention and forfeiture of goods the importation of which is prohibited by this section and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices and security to be given and the evidence requisite for any of the purposes of this section and the mode of verification of such evidence;

(d) where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of this section as if it were the name of a place in the United Kingdom;

(e) such regulations may apply to all goods the importation of which is prohibited by this section or different regulations may be made respecting different classes of such goods or of offences in relation to such goods;
(f) the Comptroller in making and in administering the regulations and generally in the administration of this section, whether in the exercise of any discretion or opinion or otherwise, shall act under the control of the Minister;

(g) the regulations may provide for the informant reimbursing the Comptroller all expenses and damages incurred in respect of any detention made on his information and of any proceedings consequent on such detention;

(h) all regulations made under the provisions of this section shall be published in the Gazette.

Warranty of genuineness of marks to be applied on sale of marked goods

16. On the sale or in the contract for the sale of any goods to which a trademark or mark or trade description has been applied the vendor 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 within the meaning of this Act unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

Provisions of Act as to false trade description not to apply in certain cases

17. Where on the 1st day of December, 1894, a trade description was lawfully and generally applied to goods of a particular class or manufactured by a particular method to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied:

Provided that where such trade description includes the name of a place or country and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced and the goods were not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description immediately before or after the name of that place or country, in an equally conspicuous manner with such name, the name of the place or country in which the goods were actually made or produced with a statement that they were made or produced there.

Savings

18.—(1) This Act shall not exempt any person from any action, suit or other proceeding which might, but for the provisions of this Act, be brought against him.

(2) Nothing in this Act contained shall entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any action or suit, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3) Nothing in this Act contained shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in Fiji who bona fide acts in obedience to the instructions of such master and on demand made by or on behalf of the prosecutor has given full information as to his master.

False representations as to Royal Warrant, etc.

19. Any person who falsely represents that any goods are made by a person
holding a Royal Warrant or for the service of Her Majesty or any of the Royal Family or any Government department shall be liable to a fine not exceeding forty dollars. (*Amended by 2 of 1945, s. 98.*)

*Controlled by Ministry of Finance*
CHAPTER 241

MERCHANDISE MARKS

SECTION 15.—MERCHANDISE MARKS (DETENTION OF GOODS) REGULATIONS

Made by the Comptroller of Customs and Excise and approved by the Governor

Short title
1. These Regulations may be cited as the Merchandise Marks (Detention of Goods) Regulations.

Interpretation
2. In these Regulations, unless the context otherwise requires—
   "officer of customs" means an officer acting under general or special direction of the Comptroller;
   "value of goods" means value irrespective of duty.

Detention of goods
3. All goods referred to in section 15 of the Act which, upon examination, are detected by an officer of customs, are to be detained by him without the requirement of previous information.

Conditions
4. In giving information with a view to detention, an informant shall fulfill the following conditions:—
   (a) he shall give to the Collector of Customs for the port of expected importation, notice in writing stating—
      (i) the number of packages expected, as far as he is able to state the same;
      (ii) the description of the goods by marks or other particulars sufficient for their identification;
      (iii) the name or other sufficient indication of the importing ship;
      (iv) the manner in which the goods infringe the Act;
      (v) the expected date of arrival of the ship;
   (b) he shall deposit with the Collector of Customs as aforesaid a sum sufficient, in the opinion of the Collector of Customs, to cover any additional expenses which may be incurred in the examination required by reason of his notice.

Security may be required
5. If, upon arrival and examination of the goods, the officer of Customs is satisfied that there is no ground for their detention, they shall be delivered. If he is not so satisfied, he shall decide either to detain the goods, as in a case of detention upon ordinary examination, or to require security from the informant for
reimbursing the Comptroller or his officers in respect of all expenses and damages incurred in respect of the detention made on his information and of any proceedings consequent thereon.

Form of security

6. The security thus required must be an immediate ad valorem deposit of ten per cent on the value of the goods, as fixed by the officer of customs from the quantities or value shown by the entry; and, also, subsequently a bond to be completed within four days in such sum not less than double the value of the goods as the Comptroller may require, with two approved sureties. The ad valorem deposit shall be returned upon completion of the bond, and shall not be required if, as an alternative where time permits, the informant prefers to give a like bond before examination upon estimated value of the goods declared to by him under statutory declaration. If the security is not duly given as above required there shall be no further detention of the goods.

Forms

7. The “notice” and “bond” required as above shall be in the forms contained in the Schedule, or in such other form as the Comptroller may from time to time order and direct.

Discharge of security

8. The security taken under these Regulations shall be given up at the times following:—

(a) where given before examination, and if no detention, forthwith;
(b) where given on detention—

(i) if the forfeiture is completed, either by lapse of time or ultimate condemnation by a court, then on such completion of forfeiture;
(ii) if the forfeiture is not completed, then—

(aa) if the goods are released by the Comptroller and no action or suit has been commenced against him or any of his officers, in respect of the detention, then at the expiration of six months from the time of detention; or
(bb) if the goods are released for failure of proceedings taken for the forfeiture and condemnation thereof upon complaint under Part XVI of the Customs Act, and no action or suit has been commenced against the Comptroller or any of his officers, in respect of the detention, then at the expiration of six months from the trial of such complaint; (Cap. 196.)

(iii) if within such periods as aforesaid any such action or suit as aforesaid has been commenced then upon the ultimate conclusion of such action or suit, and the fulfilment of the purpose for which the security was given.

Application

9. These Regulations apply to transhipment and transit goods as well as to goods landed to be warehoused or for home consumption.
SCHEDULE

NOTICE

To the Comptroller of Customs and Excise or Collector of Customs at the port of 

I hereby give you notice that the undermentioned goods that is to say, (1) 

are about to be imported into your port on or about the 

day or next in the (2) from 

That such goods are liable to detention and forfeiture being 

(3) 

That of 

and of are prepared to become my sureties in such bond as may be required upon detention of the goods.

And I request that the said goods may be detained and dealt with accordingly.

Dated this day, 19.

A.B. 

(or agent for)

Note.—his bankers (or) barristers and solicitors, and to his bankers (or) barristers and solicitors as to his sufficiency for the penalty of the bond.

(1) Describe the goods, numbers of packages, marks used and any other particulars necessary for their identification.

(2) Describe the ship or aircraft and give name or indication.

(3) State how the goods infringe the Act and if the infringement is one as to a forged trade-mark protected in a British possession or foreign state, state the possession or state; or if the infringement is one as to place or country of origin, state the name of the place or country falsely used.

BOND

Know all men by these presents, that we, A.B., and are held and firmly bound unto Her Majesty the Queen in the sum of dollars to be paid to Her Majesty the Queen, her Heirs or successors. For which payment well and truly to be made we bind ourselves, jointly and severally, our heirs, executors and administrators firmly by these presents.

Dated this day of in the year of our Lord one thousand nine hundred and .

Whereas the above-named A.B., has by a notice dated the day informed the Comptroller of Customs and Excise or the Collector of Customs at, that the undermentioned goods, that is to say,
were about to be imported into the port of ........................................
contrary to section 50 of the Customs Act, and required the said goods should be
detained and dealt with accordingly. And whereas the said goods duly arrived in
the said port on the ..................... day of ................ last, and are now
detained pursuant to the said notice.

Now the condition of this obligation is such that if the said ........................
A.B. ................................., his heirs, executors, and administrators,
shall well and effectually indemnify, save harmless, and keep indemnified Her
Majesty, her Heirs and Successors, and all her and their officers of Customs and
Excise and their executors or administrators, from and against all loss or damage,
payment or payments, and all costs and expenses which her said Majesty, her Heirs
or Successors, and her and their officers of Customs and Excise, their executors or
administrators, shall or may sustain or incur by reason or on account of any
detention of the said goods following upon the information contained in such notice
and any proceedings consequent upon such detention, then this obligation shall be
void, or otherwise shall be and remain in full force and virtue.

Controlled by Ministry of Finance