

FACULTY OF LAW
POSTGRADUATE DIPLOMA IN INTELLECTUAL PROPERTY LAW
AND PRACTICE 2021-22
Examiners' Report 2022

Part I

A. STATISTICS

(1) Numbers and percentages in each class/category

Category	2022		2021#		2020#		2019		2018	
	No	%	No	%	No	%	No	%	No	%
Distinction	15	18.07	16	23.53	15	21.43	9	13.24	10**	14 .29
Merit	27	32.53	22	32.35	15	21.43	21	30.88	n/a***	n/a***
Pass	33	39.76	19	27.94	35*****	50	34*	50.00	55****	78.57
DDPGD*****					1	1.43	0	0	0	0
Partial Fail	5	6.02	10	14.71	4	5.71	4	5.88	5	7.14
Fail	2	2.41	1	1.47	0	0	0	0	0	0
Total	83		68		70		68		70	

The assessment regime and criteria were substantially altered in 2020 and 2021 in response to the Covid-19 pandemic.

*includes one candidate who withdrew from two papers in 2017-18 and completed the Diploma in 2018-19

** includes one candidate who withdrew from three papers in 2016-17 and completed the Diploma in 2017-18

*** the merit award was introduced in 2019, and not available in earlier years

**** includes one candidate who withdrew from three papers in 2016-17 and one candidate who withdrew from two papers in 2016-17 and who both completed the Diploma in 2017-18

***** includes three candidates who withdrew from two papers in 2015-16 and completed the Diploma in 2016-17

***** this award was introduced in 2019-20 due to the Covid-19 pandemic.

***** includes one candidate who withdrew from two papers in 2018-19 and completed the Diploma in 2019-20.

(2) Vivas are not used in the IP Diploma.

(3) Marking of scripts

Scripts are double marked according to the criteria in the examination convention. Additionally, in 2022, a number of scripts for coursework assessments were double marked at the request of the Board or the Chair of Examiners to ensure consistency of approach between markers. Overall, 127 out of 320 coursework assessments (39.69%) and 27 out of 62 examination scripts (42.86%) were double marked in 2022.

No scripts were third marked.

Further details as to the second marking of scripts can be found in section B below.

NEW EXAMINING METHODS AND PROCEDURES

B. Various adjustments were made in 2019–20 and 2020–21 as a result of the Covid-19 Pandemic, including the introduction of the Assessment Support Package. In 2021–22, the provisions of the Assessment Support Package were removed.

In 2021–22 the rule giving Examiners a discretion to impose a penalty of 1 or 0 marks in response to a ‘minor’ breach of the word count rules was replaced with a general rule imposing a penalty of 1 mark. This implemented a recommendation made in the 2020–21 report.

In 2021–22 the Part II assessment once again consisted of an 8-hour, open-book, online examination, completed through Inspira. The Part I coursework assignments were also submitted through Inspira. Some candidates on this and other programmes uploaded their coursework assignments on time, but did not manage to actually submit their coursework successfully via Inspira. In recognition of this problem, the University asked Exam Boards to apply, for the entirety of the 2021–22 academic year, a late submission amnesty to candidates who uploaded before the deadline, but then did not submit within the system. The Board complied with this instruction.

C. Candidates were reminded by email of the policy, set out in the Conventions, that answers to the Part II examination must be submitted through Inspira and that it is under no circumstances permissible to submit answers outside of this system. We understand, however, that some tutors were not aware of this policy. At least one candidate typed their answers in a word processor and did not manage to submit them all through Inspira. The Board has therefore agreed to remind tutors that answers must be submitted through Inspira and that, if students decide to type answers outside of this system, they do so at their own risk.

The Part II examination once again consisted of an open-book, 8 hour, online examination. Some candidates were informed by the University that they were entitled to additional time (following approval from DAS). However, shortly before the examination, EAS informed the Faculty that the additional time allowance should not apply to 8 hour exams. The Board’s firm

view is that the general policy of not applying additional time allowances to 8 hour examinations needs to be reconsidered. It does not appear consistent with the need to make reasonable adjustments on equality grounds. It also appears out of step with the approach taken by other HE institutions. The Board is also of the view that, whatever the content of the policy, it must be clear and effectively communicated to departments, Boards, and students in good time, and the policies of, and communications from DAS and EAS must be aligned.

As in previous years, coursework assignments were not consistently marked in a timely manner; some marks were received several weeks after the deadline. The Board is deeply concerned about this. The late submission of marks prevents students from receiving timely (generic) feedback on the coursework assignments. It may also prevent the proper implementation of the policy of notifying candidates who have (on the provisional marks) failed the first two assignments. In our view, it is vital that serious consideration is given, by the Management Committee, as to the steps that might reasonably be taken to address this persistent problem. This is likely to require the provision of additional resources.

The Board also recommends that the policy on word count and citations checks should be reviewed. The current sampling method (see Part II(A)(4)) is inadequate, as it may disadvantage some candidates (ie those who are randomly checked early in the year and then added to the 'watch list' and checked repeatedly). The Board suggests that one of the following alternatives should be adopted:

- All scripts would be checked for compliance with the word count and citation rules (though this may be feasible, in practice, only if appropriate technological support can be provided);
- A particular assessment unit or units would be selected (eg two coursework assignments) and all scripts for the relevant assessment unit(s) would be checked.

D. Information concerning the examinations, including the conventions and notices of changes to the conventions, was sent to each candidate by email. The conventions were also made available online.

Part II

A. GENERAL COMMENTS ON THE EXAMINATION

1. Second and third marking

See Part I.A(3) above.

2. Materials in the examination

The examination, Intellectual Property I and II (see Part I.B above) was conducted on an open-book basis.

3. Legibility

All examination scripts were typed.

4. Word limits in coursework assessments and written examination

The Board carried out a system of checks to implement the requirements in the examination convention concerning word count for coursework assignments (see Part I, Section B above). For each coursework assignment, a sample of scripts was spot checked for compliance with the requirements concerning (a) number of words, and (b) appropriate citation practice/suppression of word count. Scripts flagged as breaching the requirements in either respect were flagged, and the remaining coursework assignments for these candidates were routinely checked for compliance in the relevant respect. The Board applied penalties for non-compliance with these requirements with reference to an agreed scale.

In the written examination, a word count limit of 1,500 words per answer was applied. Markers were instructed not to mark the sections of questions that exceeded the limit.

5. Scaling Adjustments

The Board did not consider that any scaling adjustment was necessary.

6. External Examiner

Professor Tanya Aplin continued in her role as an External Examiner. Professor Aplin was fully involved at all stages of the examination process and made an enormous contribution. The Chair wishes to express his gratitude to her.

7. Internal Examiners

Professor Ben McFarlane served on the Board for a second year and Brian Cordery served for a third. The Chair expresses his gratitude to them for their immensely valuable support in conducting the assessments in the Diploma this year.

8. Assessors

In addition to the examiners, 36 colleagues were assessors. We are very grateful to them for their commitment to the effective functioning of the IP Diploma.

9. Diploma Administrator

Letitia Derrington has been the Diploma Administrator since April 2021. We greatly appreciate everything Letitia has done to support the examination process and wish to express our sincere thanks to her.

B. EQUAL OPPORTUNITIES ISSUES AND BREAKDOWN OF RESULTS BY GENDER

Category	2020				2019				2018				2017			
	Male		Female													
	No	%	No.	%	No.	%										
Distinction	9	33.33	6	13.95	3	10	6	15.79	5	18.5	5	11.63	4	12.12	4	12.12
Merit	5	18.52	10	23.26	8	26.67	13	34.21	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Pass	11	40.74	24	55.81	19	63.33	15	39.47	19	70.38	36	83.72	29	87.89	28	84.85
Fail	1	3.70	3	6.98	0	0	4	10.53	3	11.11	2	4.65	0	0	1	3.03
DDPGD	1	3.70	0	0.00	0	0	0	0	0	0	0	0	0	0	0	0
Total	27	38.57	43	61.43	30	44.12	38	59.38	27	38.57	43	61.43	33	50.00	33	50.00

Category	2021				2022			
	Male		Female		Male		Female	
	No	%	No	%	No	%	No	%
Distinction	6	37.5	10	62.5	7	21.88	8	16
Merit	14	63.64	8	36.36	8	25	18	36
Pass	8	42.11	11	57.89	13	40.63	22	44
Fail	3	30.00	7	70.00	4	12.5	2	5
DDPGD	0	0	0	0				
Total	31	46.27	36	53.73	32	39.02	50	60.98

C. DETAILED NUMBERS ON CANDIDATES' PERFORMANCE IN EACH PART OF THE EXAMINATION

	70 plus		65-69		60-64		50-59		Under 50		Total
	No.	%			No.	%	No.	%	No.	%	
Patents 1	16	21.1	18	23.7	15	19.7	24	31.6	3	3.9	76
Patents 2	5	7.1	20	28.6	26	37.1	19	27.1	0	0	70
Trade Marks and Passing Off	6	8.1	20	27	21	28.4	26	35.1	1	1.4	74
Copyright	11	14.7	22	29.3	25	33.3	16	21.3	1	1.3	74
Designs	13	16.9	25	32.5	21	27.3	15	19.5	3	3.9	77
Intellectual Property I & II	38	17.6	83	38.4	58	26.9	34	15.7	3	1.4	216

*includes two candidates who carried their grade for Patents 1. 7 candidates carried over their Trade Marks grade. 8 candidates carried over their Copyright grade and 2 candidates carried over their grade for Design.

**includes scaling adjustment (see Section A.5 above).

D. COMMENTS ON PAPERS AND INDIVIDUAL QUESTIONS

These appear in Annexe 1.

E. COMMENTS ON THE PERFORMANCE OF IDENTIFIABLE INDIVIDUALS AND OTHER MATERIAL WHICH WOULD USUALLY BE TREATED AS RESERVED BUSINESS

These appear in Annexe 2.

Dr. Luke Rostill (Chair)
Brian Cordery (IPLA)
Prof. Tanya Aplin (External)
Prof. Ben McFarlane

Annexe 1 – Reports on individual papers

Annexe 2 – Reserved matters

Annexe 1

COMMENTS ON PAPERS AND INDIVIDUAL QUESTIONS

A breakdown of the marks on each paper appears at Part II.C of this report.

A. Coursework assessments

Patents 1

TBC

Patents 2

The Patents 2 assignment for 2021/22 concerned a patent for an invention relating to a squirrel-proof bird-feeder. The invention involved holding the feed behind a metal cage with a mesh that was large enough to allow small birds to pass through to access the feed but small enough to deny access to squirrels and other larger animals. The patent also taught using an inverted cone tied around the pole on which the feeder was placed to prevent squirrels and other animals climbing the pole. The problem required candidates to assess the law of infringement and equivalence (including numerical integers). In relation to validity, candidates needed to assess some formalistic and substantive priority issues as well as novelty (prior use) and obviousness. Some candidates raised insufficiency challenged too. A possible threats issue was present in the factual matrix.

Construction and Infringement

Almost all candidates realised that it was necessary to have two Claimants: Bullfinch Birdfeeders Limited (“BBL”) as proprietor of the patent and Leith Landscapes Limited (“LLL”) as exclusive licensee.

As regards the Defendants, all candidates included Greenleaf Gardens Limited (“GGL”). It was possible to include Georgia Greenleaf, as the moving force behind GGL, as a Defendant but on the whole, it was probably not necessary to include her. As the seller of the alleged infringing product, Wakefields Limited could also be a Defendant although there were arguments both ways; particularly as Wakefields were a potential customer of LLL. As the supplier of chilli oil to GGL, with the relevant knowledge (at least at some of the relevant times), Oli’s Oils Limited could be brought into the proceedings. There were arguments either way in relation to all potential defendants except GGL. As long as candidates argued the points coherently and convincingly, there was no right or wrong answer.

On infringement, all candidates spotted that claims 6 and 7 of the Patent were not infringed because there was no cone on GGL’s Aperture device.

In contrast, there were many arguments to be made around the infringement of claims 1 to 5. These included a spherical cage versus a cylindrical cage, stainless steel versus aluminium, thickness of wires in the cage and the coated pole. All candidates were aware of case law and applied the relevant tests. This year most candidates pleaded Particulars of Equivalence which was a distinct improvement from 2020/21. Only the better candidates analysed the post-Actavis case-law including specific case-law on numerical integers. To score highly in the future, candidates should consider and argue recent authorities. A majority of candidates pleaded knowledge of the existence of the Patent in relation to section 60(1) and section 60(2) of the Patent which is not required.

Many candidates chose to use a claims chart which as always proved to be a good way to convey information clearly and convincingly.

Validity

During the teaching element of the course, the tutors impressed upon candidates the need to assess any patent's entitlement to priority and the possible effect that these could have on the date on which validity is assessed. They are also guided on the need to assess priority from both formalistic and substantive angles. As with previous years, this year's problem tested both. Most candidates picked up on both issues, recognising that claims 4-7 were not enabled in the original priority document and that there was a formalistic priority issue as between the person filing the application (Nancy) and the applicant (BBL). Again, most candidates picked up that formalistic priority is a bit of a foot-fault causing no real prejudice to third parties and that equity might well come to the aid of the patentee here.

Many candidates separated out the analysis on two bases: (i) if the claim to priority was valid and (ii) if it wasn't. Many stronger candidates separated out the analysis using headings in their pleadings which made things clear and easy to understand.

When it came to challenging novelty at the priority date, there were two realistic matters to be pleaded – (i) the use of the prototype by Nancy in her back garden and (ii) EP 534. As regards (i) most candidates picked up the similarity of the facts to *Mishan v Hozelock* [2019] EWHC 991 (Pat). Hardly anyone picked up the more recent *Claydon Yield-O-Meter v Mzuri IPEC* decision [2021] EWHC 1007. As regards (ii) EP 534 was a “novelty-only” citation if BBL patent was entitled to priority. Many but not all candidates picked up on this and worked out what was available as prior art and in which circumstances. It was pleasing that many candidates looked at all the claims and what was disclosed in the prior art (e.g. a Teflon coating could not be seen from looking at the prototype over a garden wall).

Nancy's original prototype was also potentially available for inventive step on the priority date.

At the filing date, the second prototype was in play for the assessment of validity and disclosed more than the first prototype. EP 534 also became full prior art.

The documentary prior art revealed in the search was patchy at best and some was not prior art at all (hungrybirds.co.uk). Of all the prior art, Pidge Proof was probably the only one worth pleading. On the whole, candidates analysed the prior art well, Many stronger candidates used claim charts.

Some candidates pleaded insufficiency and generally did so well.

Finally, as well as the usual matters dealt with in the Defence including a staple commercial product defence in respect of olive oil, there was the basis for an unjustified threats action against BBL and LLL. Only one or two candidates mentioned this as a possibility and were rewarded as a result.

Trade Marks and Passing Off

TBC

Copyright

The questions related to an outdoor theatre owned by the client, TheatreOutdoors (TO), which was considering how to expand its activities to counteract dwindling audiences and a loss of income. It was planning to use recordings of plays performed in the theatre in new ways. Two examples of recorded plays were given, Romeo and Juliet (R&J), and Danger After Dark (DAD), written by Bella and directed by Anoush. Romeo and Juliet as written by Shakespeare was unquestionably out of copyright. DAD was not.

The client was seeking commercially-oriented advice as to how it could proceed with three ideas: to make the recordings available online; to provide amateur productions of watered-down versions of the plays in the theatre to appeal to schools; and to provide interactive experiences using the plays but with added material.

The questions were focused on commercial plans rather than disputes. They expected the candidates to think about the kinds of rights which arise in performances and recordings of them, to consider who might own those rights, who might be able to (and wish to) enforce them, and to consider how new rights might arise through the activities suggested.

The questions asked candidates to consider what commercial and practical steps TO should take to proceed. This was generally competently discussed, with the better papers showing a strong understanding of how this might be done in practice. The better answers recognised that TO wanted to avoid disputes (to behave within the law) and therefore suggested ways in which that might be achieved, without litigation. The discussions of commercial terms were generally sound.

Overall, the handling of the questions was good, with some very good papers, though some were not strong. The best paid close attention to the facts and the law. There was little use of note form and mostly good use of citation. Some papers however cited foreign cases, or very old cases, without explaining why they were relevant to the CDPA.

The questions

Question 1: The question proposed that TO could set up a video on demand (VOD) service for a paying audience, initially using its recorded plays, and expanding to recordings of new plays in the future.

Most candidates used R&J and DAD as examples to illustrate their points here. Others discussed the rights which might arise in plays generally, and looked at the specific rights in DAD in question 2. Both approaches worked. Most candidates recognised the rights which might arise, including performing rights.

A number of candidates considered that the scripts for the plays would be literary rather than dramatic works, contrary to the view expressed in *Kogan v Martin* [2019] EWCA Civ 1645 at para 66.

On the sounds that appeared in the plays, the best candidates distinguished the naturally-occurring sounds in the background of the performances, which they were confident to say enjoyed no protection, from the deliberately-included sound effects (which might or might not be in the form of sound recordings). They spotted (here or in question 2) that Anoush's use of "easily recognisable, idiosyncratic use of mixtures of sound and light" was an opportunity to discuss *Cofemel* and its impact. They recognised that Anoush might have authorial rights in his mixtures, and distinguished that from his position as director of DAD (and from the director of the recordings of the plays).

The majority of candidates identified who might own the various rights discussed, looking e.g. at the status of the authors as employees. The better papers considered the specific infringing acts which TO might do without appropriate rights in place, rather than saying broadly that there might be infringement. They noted that existing permissions to record the plays might not be wide enough to cover the planned VOD service. A number suggested that the playwrights might assign their rights to TO, which was probably commercially unrealistic.

Question 2: The question proposed that the theatre could use amateur performers to act the plays before school students, though not only to them. The works might be watered down, to be suitable for children.

A view here was that the new versions would be adaptations of the originals, under CDPA s21. Given the view in Kogan that scripts are dramatic rather than literary works, that was unpersuasive. They would however be derivative works as other papers discussed. Candidates generally recognised that the new versions would both need permission from the copyright owners of any works still in copyright, and themselves enjoy copyright, if they were original. Some noted that there might be a reluctance to license plays for amateur productions. Others noted the s34 education exemption with some good discussions as to how TO might adapt its plans take advantage of it.

The question invited a discussion of moral rights, particularly given Bella's liking for unconventional performances and strong reactions to her plays. The best candidates recognised that she might object to a watered-down version of DAD on the basis that it was derogatory to her reputation by suggesting that she had "gone soft".

Question 3: The question proposed that TO could offer an interactive experience in which its audiences could influence the direction of a play, e.g. by having Juliet decide not to marry Romeo.

Good answers explained that the general idea of participative plays would not be protected by copyright, and that the focus should be on the concrete expression of them. They understood that if there were pre-written scripts to follow the audience's choice as to the direction the play should set, those scripts should enjoy copyright protection of their own. They discussed format rights and recognised that whilst format rights have not been found to subsist by the UK courts to date, *Banner v Endemol* had given some guidance as to how they might be. They also discussed how to avoid problems with audience members themselves gaining enforceable copyright rights.

Designs

The question revolved around Bell & Co, designers working as sub-contractors on housing estate projects, and their work for EagleDev on an estate of 200 houses, RegencyEstate. Two products were in issue: a gate and a doorknocker. The gates had been provided by DomProds and installed on the estate, including for a house now owned by Ceb (Cebsgate). Objections to the Cebsgate had been made in a letter to Ceb from FabianDesigns, who claimed they had rights in the design of their FabianGate that they would enforce against Cebsgate. FabianDesigns complaint had made Bill Bell, founder of Bell, concerned about Bell's acquisition and provision of its products more generally. He asked for advice about that, focussing on a lion's head door knocker Bell was thinking of installing in future (Lion1).

Overall, the candidates' papers were good, and some were excellent. They showed a good understanding of the different rights that might cover the design of Cebsgate and Lion1, and the strengths and weaknesses of Bell's legal position. Some used the pictures provided to illustrate their points, which in most cases worked very well, although there was some overuse of tables and note form. Most noted that the dates on which the other designs shown were made available were not known, but would have a significant impact on the merits.

Many candidates gave good advice as to the steps Bell should take to counteract the difficulties it might face. The less strong papers however suggested strategies which did not reflect the candidate's views of the merits, with some for example suggesting that although they felt Bell's position in relation to the Cebsgate was strong, Bell should negotiate a licence from FabianDesigns, and others suggesting that although there might be problems with Lion1, Bell should nevertheless acquire it, rather than, for example, acquire a knocker to a different design.

The best papers also discussed the unknown nature of the relationships, and contractual terms, between DomProds and Bell, and between Bell and EagleDev, advising that those should be checked and any relevant terms, e.g. as to conduct of disputes, noted. They advised well as to the terms Bell should seek to include in any future contracts, recognising that there might be back-to-back terms between their contracts with suppliers and their contracts with customers.

One candidate raised a concern after the deadline, based on a perceived difficulty with the wording of the question. The examiners were aware of the concern, but saw no signs that any papers had been impacted.

Cebsgate

FabianDesigns had a registered design which was not exactly the same as the design of the FabianGate or the Cebsgate. As virtually all candidates recognised, from the dates given, the FabianGate might also be protected by unregistered UK design right, depending on whether the other gates shown did or didn't pre-date it. They recognised that any unregistered design would be in the licence of right period, which might impact the position Bell might adopt. The best candidates formed the view that FabianDesigns had a weak case, and advised accordingly, whilst caveating that further investigations would be needed.

Registered design

Most candidates covered this soundly. Some did not spot that the given registered design showed who owned it and that the renewal fees were up to date. Others dwelt on whether or not parts of the design might be excluded from protection, which was of doubtful relevance to validity, given that the design was for a whole gate. A notable number of candidates recognised the squeeze – that if GateC pre-dated the registration, the registration might be invalid in light of it, or its scope so narrowed by GateC that the Cebsgate would not infringe.

UKUDR

The quality of the responses here varied. The candidates showed a good understanding of UKUDR, and were prepared to say that the Cebsgate would not infringe any UKUDR claimed for the design of the whole of the FabianGate. However, the consideration as to whether there were any parts of the Cebsgate which might infringe UKUDR in an equivalent part of the FabianGate design was not always as strong. The best papers indicated that FabianDesigns might be in difficulty in finding a design of a part to which the Cebsgate was exactly or substantially made, and which met the originality requirements.

There was some confusion over the difference between s 227 of the CDPA – secondary infringement occurring when the infringer deals in the specified ways with an article which is, and which he knows or has reason to believe is, an infringing article, and s233 (2), where there has been secondary infringement, but the article was originally innocently acquired. The better candidates explained that under s227 the knowledge requirement had to be satisfied or there would be no infringement at all, but that even if the knowledge requirement was satisfied, the remedies would be limited to those available under s233 (2) if the article had been innocently acquired.

The candidates generally dealt well with the plain threat that FabianDesigns had made to Ceb, and its potential consequences, although the suggestion from some that Bell should start a threats action was unpersuasive.

Lion1

The question asked the candidates to consider what unregistered rights there might be in Lion1. It also asked whether Bell might face claims if it were to instal them.

Two rights were relevant on the dates: UKUDR and the supplementary unregistered design right (SUD). On the dates, there could be no unregistered community design (UCD) or continuing unregistered design (CUD). Most candidates discussed the UKUDR and SUD. Some however fell into error by considering either a UCD or CUD, or in a notable number of papers, failing to consider SUDs.

Some papers also omitted any discussion of the rights which might subsist in Lion1 itself. However, most noted that there appeared to be a number of similar designs on the market, and that it was therefore uncertain whether third parties might have rights which would cause Bell a problem, and whether Lion1 itself might enjoy protection. The best therefore advised Bell to look for a different product. They also suggested ways in which Bell could protect itself in future through appropriate terms in its contracts with its suppliers and customers.

B. Intellectual Property I & II (Examination)

Q1 Candidates were asked to advise on infringement by Ycoris of both the '345' and '789' patents, and the validity of the '345' patent only. Overall, the answers were of a good standard. Few papers address all relevant issues, however a significant number were able to address the key points in a clear and well-structured manner. To answer this question well candidates had to first identify the inventive concept of each claim (particularly those of the 345 patent). Failure to do this early in the analysis often resulted in a confused response for both infringement and validity. Other common mistakes included considering issues that did not arise in the facts, or that the candidate was not asked to consider – e.g. whether infringement of 789 patent would arise if Ycoris manufactured in the UK; or whether infringement of 789 could arise under Swiss law; or considering the validity of 789 patent; or the relevance of data/marketing exclusivity rules. In addition several answers, having identified the relevant law, failed to apply it to the facts presented. Failure to reference the relevant provision and/or case law also had a negative impact on the marks awarded. The following provides a brief overview of the key issues the examiners expected candidates to address:

Infringement

345 patent – There was potential for direct infringement of all claims by Ycoris by importing and distributing codipine as a medicinal product (s60(1)(a)). However, infringement of claim 3 did depend on whether it was viewed as a product or process/method claim (see more detail under validity below). If the latter, then claim 3 was not infringed. Most candidates did seem to treat claim 3 as a process claim, which was an acceptable interpretation.

345 patent – Indirect infringement of claim 4 (possibly claim 3 if considered to be a method of administration) under s60(2). Will Ycoris be supplying the means necessary for others to infringe (i.e. pharmacists, doctors, even patients) by using the product for the patented indication?

789 patent – Y is making use of a patented process in Switzerland (as this is the only known method for producing this new class of DDs). While there was no infringement under s60(1)(b) as use was not in the UK, there was potential for infringement under s60(1)(c) – importation of a product obtained directly from a patented process.

Validity

789 patent – there was nothing to suggest that this process patent was not valid and the candidates were not asked to consider the validity of this patent.

345 Patent:

- i) Novelty – Does the 789 patent anticipate claim 1 of 345 patent – i.e. does the process patent anticipate the product patent? Does the 789 patent contain an enabling disclosure? When using the patented process the manufacture of the new compounds may be an ‘inevitable result’, thus claim 1 may be anticipated (there was some room for argument here). A good number considered the relevance of the 789 patent application in this way. However, a significant number incorrectly dismissed 789 as being a claim to a process so not relevant for the product claims in 345.
- ii) Inventive Step – If claim 1 is not new, and the compounds part of the state of the art, then Claim 2 (and possibly claim 3) is to medicinal products made from a known compound and therefore likely obvious developments. Unfortunately, very few candidates identified this ground despite many finding that claim 1 lacked novelty.
- iii) Claim 3 - Method of medical treatment? – The wording of the claim is not clear. Is it directed to a method of treatment/administration (i.e. a method on how to inject the drug intravenously)? Or, is it directed at the compound in intravenous form? Most candidates treated it as a method claim, which was an acceptable interpretation and therefore many considered the relevance of the exception for methods of medical treatment.
- iv) Sufficiency – It was expected that claims 1 and 4 would form the basis of this analysis.
 - a. Claim 1 – Classic insufficiency – the earlier 789 patent explained how to make the invention. Few candidates picked up on the possible relevance of 789 patent. Of those that did, some questioned its relevance given the filing dates – i.e. can the earlier 789 patent be considered part of the state of the art given it had not been published when 345 was filed.
Most treated the sufficiency of claim 1 as a matter of Biogen insufficiency.
 - b. Claim 1 – Claim 1 is directed at the compounds only and was not a ‘use’ claim. However, a few students correctly considered the issue of ‘Agrevo obviousness’ and plausibility. The fact that it was known that DDs were useful in the treatment of hypertension should have been enough to satisfy the plausibility test and to confirm that claim 1 does make a technical contribution.

- c. Claim 4 – ‘Use’ claim and a true plausibility issue. Is there enough information disclosed in the specification to make the essential feature of the claim (i.e. the use) plausible? Unlikely. This point was generally addressed well.
- d. Claim 2- Given the rather vague wording of this provision some also considered sufficiency here as well (mostly as being invalid for uncertainty). Routine experimentation, however, may ultimately have disclosed the effective amount. Thus, a failure to disclose the exact amount or range in the specification may not have been fatal. Few candidates gave this any thought.

Q2 asked candidates to advise on the likely success in a trade mark opposition. The quality of the answers was generally quite high. Candidates who did poorly tended not to understand the nature of the opposition process and structured their answers around the possibility of bringing an action for infringement. The small number of candidates who scored below 50 on this question all made this fundamental error. Another group of candidates understood the opposition process and did at least reasonably well with the trade mark elements, but failed to demonstrate that they understood how a copyright claim might be relevant to the opposition (TMA, s 5(4)(b)). Candidates who demonstrated an understanding of the procedural point were then largely separated by who well they dealt with the issues. In other words most candidates spotted most issues (deceptiveness under 3(3)(b), opposition based on relative grounds, that 3(3)(a) is probably a red herring, etc), but the depth and sophistication of the answers on these issues varied considerably. The one issue that was missed by most candidates was the non-use point. Candidates were often hazy on how non-use is relevant to opposition proceedings and focused on the standard of use rather than the place of use.

Q3 asked candidates to critically evaluate the function of the patent system through the current rules on employee inventions. This question requires the candidate to consider whether patent provisions strike a good balance between the patent owners (usually the employers) and the inventors (the employees). In general, candidates provided very good reasoning and analyses as to the justification of the patent system (utilitarianism, natural rights), current law and the cases. Some have taken a step further by referring to AI (Thaler case) to highlight the challenges regarding inventorship. Most answers concluded that “a distorted interpretation of a well-functioning patent” has been overstated in this case because the companies have to invest a lot to turn an abstract idea (the invention) into a profitable product. In addition, it will be impractical for companies to award every inventive concept. A very good answer used “team effort” to argue that the whole team is the ones that needs to be incentivised. Those who scored high marks had a structural analysis, the conclusion flowing nicely from the arguments and did not go off on a tangent; as well as engaged critically with case law and literature. A small number of answers strayed away from the main topic or merely cited the lecture without engaging with legal scholars.

Q4 asked candidates to critically evaluate whether ‘all designs are equal, but some designs are more equal than others’, with an emphasis on subsistence and infringement variations. The question invited candidates to reflect upon whether there presently is (or ought to be) room for industry specific variations – and which rules allow this – within a seemingly uniform and neutral regime. There were several creative, well-reasoned answers to this question. Candidates explored differences relating to the nature of the rights (shorter duration unregistered rights favouring fast-paced, trend-driven industries like toys and fashion, as opposed to those like furniture or automobiles); the extent to which the test for infringement, via the overall ‘impression of the informed user’ thresholds, made it difficult for *all* industries to assert rights; the extent to which limitations and exclusions like ‘must fit’ and ‘spare parts’ affected certain industries more than others; and the extent to which design freedom might vary according to the industry in question. Those who agreed with the question, as well as those who challenged it, scored highly depending on the degree to which they substantiated their answer with case law, legal rules and commentary. However, those who merely

reinterpreted the question as inviting a critique of the overall impression test (revisiting the authorities including *Trunki*, which find designs to be valid but not infringed) missed the point. This was not a question solely focused on the 'over-informed user' in design law; that (un)reasonable person who works tirelessly to obstruct the interests of claimants in design litigation.

Q5 invited candidates to critically consider whether the judicially developed public interest defence to copyright infringement is still relevant, in light of a slew of new statutory defences. Most candidates who answered this question did well but remained on conventionally safe terrain. They identified the cases debating whether such a defence exists in the first place (*Lion Laboratories*; *Hyde Park*; *Ashdown*); the transition in the public policy foundations of this defence (from excluding immoral works to protecting expressive interests which further public debate); and the extent to which criteria for a test might be identified. Better answers investigated the relationship between s. 171(3) and the doctrinal account of this defence; the extent to which EU or Berne obligations had undermined its very existence; and its residual role (e.g. for photographs or unpublished works) in light of the new statutory exceptions, with an emphasis on criticism, review, news reporting and the quotation exception in particular.

Q6 invites candidates to discuss the way breach of confidence balances the protection of commercial and technical information against uses or disclosures of that information which promote competition. Only two candidates attempted to answer this question. A good answer does not only rely on the UK common law of confidentiality but also extends to analyse how it will sit with the Trade Secret Directive and Regulation. The position of the UK requires deeper analysis due to Brexit as not all the provisions under the EU Trade Secret Directive are fully transposed. Some are partially transposed. If a paper merely cited *Coco v Clark* and listed three conditions of trade secret under the Directive, it is not good enough. Other areas that can be explored are the employee-employer relationship and breach of confidence in relation to the third party.

Annexe 2

RESERVED MATTERS

1. Medical certificates, dyslexia/dyspraxia and special cases

Eight candidates were forwarded to the Examiners under Part 13.2 and 13.3. (Mitigating Circumstances: Notices to Examiners) of the *Examination Regulations*. 5 MCE's were banded as a 3, 1 MCE was banded as a 2, 1 MCE was banded as a 1 and 1 was not applicable. The Examiners considered it appropriate to alter one classification from a fail to a pass.

2. Penalties for non-compliance with word limits

In accordance with the policy on penalties for non-compliance with the word count and citation rules, the Board applied penalties for each coursework assignment as follows:

Assignment	Total penalty of 1 mark	Total penalty >1 mark	Script/question not marked
Patents 1	1	0	0
Patents 2	3	0	0
Trade Marks	6	0	0
Copyright		0	0
Designs		0	0

3. Change of results

It came to light after results had been released that 15 marks were wrongly recorded due to an administrative error. With respect to 13 of the 15 candidates, the change did not affect the overall outcome. In two cases, however, the overall outcome was affected (though one of these is subject to an appeal). The Board recognises that this is a matter of grave concern and every effort must be made to ensure that this does not happen again. The Board suggest that the current system for recording and checking marks is thoroughly reviewed and, where appropriate, reformed.