

**FC4 (D&C) UK Patent Law
FINAL Mark Scheme 2016**

In this mark scheme the following annotations will be used:

- **CDR:** Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs
- **CDIR:** Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation EC No. 6/2002 Council Regulation
- **CDPA:** Copyright, Designs and Patents Act 1988
- **RDA:** UK Registered Designs Act 1949
- **EUIPO:** European Union Intellectual Property Office (formerly OHIM)

Knowledge of Section/Article numbers is not required.

Question 1

Explain, with reasons, whether the following are protectable. In each case, assume there is novelty, individual character or originality, as appropriate. There is no need to discuss any issues relating to ownership or qualification requirements.

- a) an application for a UK design registration for a logo for a pro-monarchy group including a portrait of the Queen in front of the Union Jack flag **3 marks**
- b) copyright in an x-ray **2 marks**
- c) UK unregistered design right in a car door **4 marks**
- d) Community Unregistered Design right in a vehicle bumper sticker showing very offensive language **1 mark**

Total: 10 marks

Answer

Half marks may be awarded where candidates have not been precise

- a) (i) Schedule A1 to the RDA says a registration shall be refused if involves a Union Jack and the registrar considers its use would be misleading or grossly offensive, but a supporters' group would not appear to fall into this category. **(1 mark)**
(ii) However, Schedule A1 also stipulates that an application including a representation of Her Majesty will be refused unless the Queen has given permission. **(1 mark)**
(iii) Assuming she has not, as it would be unlikely, **(0.5marks)**
(iv) the answer is No **(0.5 marks)**. **3 marks**
- b) (i) Maybe **(0.5 marks)** [equivalent marks given if say yes or no and give support with good reasons].
(ii) Copyright subsists in an artistic work (Section 1 CDPA). Can the x-ray be considered artistic? **(0.5 marks)**

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(iii) Section 4 CDPA defines artistic works to include photographs, a photograph being a recording of light on any medium on which an image is produced by any means and which is not part of a film. **(1 mark)**

(iv) [A mark is alternatively available for saying copyright subsists in the arrangement of the x-ray subject]

2 marks max

- c) (i) Section 213(2)(b)(ii) CDPA indicates there is no design right in features of shape or configuration which are dependent upon the appearance of another article **(0.5 marks)**

(ii) ...of which the article is intended to form an integral part **(0.5 marks)**.

(iii) Section 213(3)(b)(i) excludes must fit features **(1 mark)**,

(iv) ...and Section 213(3)(c) excludes surface decoration **(1 mark)**.

(v) Thus, unless there are 3D features not dependent upon the appearance or fit with other components such as the door opening **(0.5 marks)**,

(vi) ...the answer is no **(0.5 marks)**

4 marks

- d) Assuming the language is bad enough to be deemed to be contrary to public policy/accepted principles of morality – no (Article 9 CDR)

1 mark

Total: 10 marks

Question 2

- a) What is meant by “exhibition priority” according to *Article 44 “Exhibition priority”* CDR? **3 marks**

- b) What does an applicant for a Community Registered Design need to do if he wishes to claim exhibition priority?

2 marks

- c) What effect does exhibition priority have on the priority right provided by the Paris Convention for the protection of industrial property?

1 mark

- d) Explain:

i. what actions the EUIPO takes if it finds that a design is non-registrable

1 mark

ii. what action the applicant needs to take, and

2 marks

iii. the possible outcomes of those actions.

1 mark

Total: 10 marks

Answer

Half marks may be awarded where candidates have not been precise

- a) (i) If an applicant for a registered Community design has disclosed products in which the design is incorporated, or to which it is applied, at an official or officially recognised international exhibition falling within the terms of the Convention on International Exhibitions, **(1 mark)**

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- (ii) ...he may, if he files the application within a period of six months from the date of the first disclosure of such products, **(1 mark)**
 (iii) claim a right of priority from that date within the meaning of Article 43 CDR **(1 mark)**
3 marks
- b) (i) He must file evidence that he has disclosed at an exhibition the products in or to which the design is incorporated or applied. A44 CDR **(1 mark)**
 (ii) He also needs to file a declaration that exhibition priority is being claimed, stating the name of the exhibition and the date of first disclosure of the products in which the design is incorporated or to which it is applied. Article 1 CDIR **(1 mark)**
2 marks
- c) No effect – Article 44 CDR states exhibition priority does not extend the 6-month priority period. (Marks also awarded for providing similar wording.)
1 mark
- d) (i) (i) According to Article 11 CDIR EUIPO will issue an examination report **(0.5 marks)**
 (ii) ...setting a time limit **(0.5 marks)**
 (ii) (iii) ... applicant can submit observations **(0.5 marks)**,
 (iv) ...withdraw the application **(0.5 marks)**
 (v) ...or amend it by submitting an amended representation of the design, provided that the identity of the design is retained **(1 mark)**.
 (iii) (vi) If the applicant fails to overcome the grounds for non-registrability within the time limit EUIPO will refuse the application for the designs concerned, or for all designs as appropriate. Otherwise, assuming all else in place, is registered. **(1 mark)**
4 marks

Total: 10 marks

Question 3

In relation to UK unregistered design right in a design created after 1 October 2014, explain whether the following would meet the qualification requirements under *Section 217 "Qualifying individuals and qualifying persons"* CDPA:

- a) a designer who is an individual who lives in the US
3 marks
- b) a company that employs a designer, the company being formed in accordance with Italian law
4 marks
- c) a designer, resident in Japan, of a product embodying a qualifying design, the product having being first marketed in Spain
3 marks

Total: 10 marks

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Answer

Half marks may be awarded where candidates have not been precise

- a) (i) Section 218 CDPA – qualifies if designer is a qualifying person **(0.5 marks)**:
 (ii) Section 217 CDPA - an individual must be habitually resident in a qualifying country **(0.5 marks)**,
 (iii) ...where a qualifying country is the UK, (a country covered by a Section 255 order), another EU member, or a country afforded reciprocal protection **(1 mark)**.
 (iv) The US doesn't fall under any of these so does not meet the requirements **(1 mark)**.
3 marks
- b) (i) Section 219 CDPA – qualifies if design created in course of employment with a qualifying person **(1 mark)**.
 (ii) Section 217 CDPA - a company would be a body corporate or other body having legal personality as mentioned under Section 217(b) CDPA, which, for there to be UDR, must be formed under the law of a part of the UK/other qualifying country **(0.5 marks)**
 (iii) (Italy is in EU so is a qualifying country **(0.5 marks)**)
 (iv) ...and has in any qualifying country a place of business at which substantial business activity is carried on **(0.5 marks)**.
 (v) For determining substantial business activity, no account is taken of dealings in goods which are at all material times outside that country **(0.5 marks)**.
 (vi) We don't know this but, assuming it meets the requirements mentioned under (a), then the qualification requirements would be met **(1 mark)**.
4 marks
- c) (i) For the first marketing provisions to apply the design cannot qualify for protection by reference to designer (Section 218) or employer (Section 219) **(1 mark)**.
 (ii) Then, qualifies if the first marketing is by a qualifying person and first marketing takes place in the UK, another country subject to a Section 255 (but not Section 256, reciprocal protection) order or another EU member **(1 mark)**.
 (iii) So a designer who is Japanese because Japan is not a qualifying country but the first marketer does qualify under one of the requirements mentioned above **(1 mark)**.
3 marks

Total: 10 marks

Question 4

Define the grounds for invalidity of registration of a UK registered design, according to Section 11ZA "Grounds for invalidity of registration" RDA.

Total: 10 marks

Answer

(Max 10 marks from the following:)

Section 11ZA RDA:

- (i) - Doesn't fulfil requirements of Section 1(2) RDA i.e. doesn't fall within definition of a "design" **(1 mark)**, or doesn't fulfil requirements of Section 1B to 1D i.e.
 (ii) – Design not novel (Section 1B) **(1 mark)**

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- (iii) – Design doesn't have individual character (Section 1B) **(1 mark)**
- (iv) – Design relates to features of appearance solely dictated by technical function (Section 1B) **(1 mark)**
- (v) – Design relates to “must-fit” features (Section 1C) **(1 mark)**
- (vi) – Design is contrary to public policy or morality (Section 1D) **(1 mark)**
- (vii) – Design relates to certain emblems as defined (in Schedule A1) **(1 mark)**
- (viii) - If design is not new/does not have individual character when compared to a later published/earlier filed UK/EU/Hague (EU) design (section 11ZA(1A)) **(1 mark)**
- (ix) – Registered proprietor is not the proper proprietor (Section 11ZA(2)) **(1 mark)**
- (x) – Design involves use of an earlier distinctive sign, the use of which is prohibited in the UK if rights holder objects (Section 11ZA(3)) **(1 mark)**
- (xi) – Design registration constitutes unauthorised use of copyright protected work and © owner objects (Section 11ZA(4)) **(1 mark)**

Total: 10 marks

Question 5

Assuming no authority or licence to use has been granted, explain, with reasons, whether or not the following acts would constitute infringements of UK copyright:

- a) a student photocopying a chapter of a book to help with her exam revision **2 marks**
- b) a social group watching a film from a DVD brought in from home by one of the members **2 marks**
- c) re-issuing advertising materials to households in the UK that have already been distributed with the copyright holder's consent in France **2 marks**
- d) importing poor quality copies of books into the UK for the purpose of reselling them at standard retail prices to make a profit **2 marks**
- e) rewriting software for a mobile phone app that runs on one operating system into software that can run on a different operating system for a different make of mobile phone **2 marks**

Total: 10 marks

Answer

Half marks may be awarded where candidates have not been precise

- a) (i) No - the copyright owner has the exclusive right to do acts including copying (Section 16 CDPA) **(0.5 marks)**,
(ii) ...and “copying” means reproducing in any material form (S17) and would include photocopying, but exam revision would constitute private study which is not considered an infringement (Section 29 CDPA) **(1 mark)**

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- (iii) Copying just a chapter would be fair dealing and is acceptable under section 29 CDPA **(0.5 marks)**
- b) (i) Yes (probably) – Section 16 CDPA says the copyright owner has the exclusive right to, inter alia, perform or show a work in public **(1 mark)**,
(ii) ...and Section 19 CDPA restricts the playing or showing of such a work in public. The DVD is likely to be a personal, not-for-public showing copy of the film, and thus restricted **(1 mark)**
- c) (i) No – Issuing copies of a work to the public is a restricted act under Section 16 CDPA **(1 mark)**,
(ii) ...but Section 18 CDPA allows subsequent distribution of copies in an EEA state previously put into circulation within the same or another EEA state **(1 mark)**
- d) (i) Yes (probably) – If the books are poor quality, they may not be legitimate versions **(0.5)**.
(ii) It's secondary infringement to import to the UK **(0.5)**,
(iii) ...for reasons other than private/domestic use **(0.5)**,
(iv) ...articles which are and the person knows/believe are infringing copies (Section 22 CDPA) **(0.5)**
(v) Also, section 23 applies – possession, selling, distributing **(0.5)**,
(vi) ...even if outside the course of business **(0.5) (2 marks max)**
- e) (i) Maybe **(0.5 marks)** –
(ii) Section 16 CDPA does not permit adaptations of works **(0.5 marks)**
(iii) ...and Section 21 CDPA says, for computer programs, adaptations include translations that convert into or out of a computer language or code into a different computer language or code **(1 mark)**
(iv) Section 29 says it's not fair dealing to convert a computer program from a lower level language into a higher level language **(1 mark)**

(up to max 2 marks)

Total: 10 marks

Question 6

- a) According to *Article 80 "Community design courts"* and *Article 81 "Jurisdiction over infringement and validity"* CDR, what is a Community design court, and for what does it have exclusive jurisdiction?
6 marks
- b) If the owner of a Community Registered Design brought an action concerning infringement of his registered design against a third party, where would the action be heard if the Community Registered Design owner was based solely in the US and the alleged infringer is based solely in Canada? Give reasons to explain your answer.
4 marks

Total: 10 marks

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Answer

***Half marks may be awarded where candidates have not been precise**

- a) (i) Article 80 CDR: Community design court is a national court/tribunal **(0.5 marks)**
(ii) of first and second instance **(0.5 marks)**,
(iii) designated by an EU member state **(0.5 marks)**,
(iv) that will perform the functions assigned to it by the CDR **(0.5 marks)**. It has exclusive jurisdiction for:
(v) 1 - Infringement actions and, if permitted under national law, actions in respect of threatened infringement of Community designs;**(1 mark*)**
(vi) 2 - Actions of declaration of non-infringement of Community designs if permitted under national law; **(1 mark*)**
(vii) 3 - Actions for a declaration of invalidity of a CUD; and **(1 mark*)**
(viii) 4 - Counterclaims for a declaration of invalidity of a Community design raised in connection with actions under (i) **(1 mark*)**
- b) (i) According to A82 CDR, action is brought in court of EU member state where defendant is domiciled or has establishment, **(1 mark*)**
(ii) ...otherwise in court of EU member state where plaintiff is domiciled or has establishment, **(1 mark*)**
(iii) ...or else at a court in the state where the Office is based (Spain) **(0.5 marks)**.
(iv) Neither plaintiff nor defendant are based in EU, so is Spain by default **(0.5 marks)**
(v) ...– unless the parties agree otherwise **(0.5 marks)** or can be brought in the court of a member state where infringement was committed/threatened. **(0.5 marks)**

Total: 10 marks

Question 7

You receive a query from a UK company, Shakers Ltd., regarding their new design for a stackable condiment set (as shown in the drawings). The pepper shaker P is cylindrical and has a star-shaped bore. The salt shaker S has a disc-shaped base that is the same size as P and a star-shaped main body sized to fit within the bore of the pepper shaker. This allows the shakers to be stored together or used separately. Half-star shapes T adorn the shakers S and P and form whole stars when the shakers are stacked.

Discuss what UK unregistered design protection might subsist for the products S and P and for the features T under *Section 213 "Design Right" CDPA*. (There is no need to discuss whether the statutory qualification criteria for design right protection are met).

Total: 10 marks

Answer

Half marks may be awarded where candidates have not been precise. Marks up to the maximum 10 marks may be awarded for some of the following points. Other marks may be awarded for equivalently acceptable answers.

Shakers S, P

- (i) UDR could subsist in shape or configuration of the shakers S, P themselves, the bore of P, the arrangement of the holes **(1 mark)**.

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- (ii) Known cylinders, star-shapes and shakers would be prior art, but the configurations shown for each shaker could be unique and thus original and not commonplace in the design field in question at the time of creation **(1 mark)**.
- (iii) The appearance of the combination of S and P together may not be commonplace and therefore may give rise to UDR **(1 mark)**.
- (iv) The shakers are functional, but there is no exclusion for solely dictated by function, so they are not excluded on this basis **(1 mark)**.
- (v) The internal and external star shapes of P, S could fall foul of the “must-fit” exclusion as they are designed to cooperate with each other since the shakers are designed to be stackable **(1 mark)**.
- (vi) That could mean these co-operating features may be excluded from protection **(1 mark)**
- (vii) ...but the primary function of the shakers is to shake salt and pepper not to be stackable, so this might not apply **(1 mark)**.
- Features T
- (viii) Surface decoration is excluded from protection, so there is no design right in the stars T themselves **(1 mark)**.
- (ix) There's also a must match exception relating to whether the appearance of one product depends on another **(1 mark)**.
- (x) The star designs on each of S and P are clearly intended to match up, so it's possible the “must match” exclusion may apply **(1 mark)**.

Total: 10 marks

Question 8

- a) According to *Article 89 “Sanctions in actions for infringement”* CDR, what sanctions are available in an action for infringement, and under what conditions?
7 marks
- b) According to Article 19 “Rights conferred by the Community Design” CDR, a Community Registered Design confers on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. What particular uses are mentioned?
3 marks

Total: 10 marks

Answer

Half marks may be awarded where candidates have not been precise

- a) Article 89 CDR: the action finds a defendant has infringed or threatened to infringe a Community Design, it shall, unless there are special reasons for not doing so **(1 mark)**, order:
- i. an order prohibiting the defendant from proceeding with the acts that have/would infringed/infringe the CRD **(1 mark)**;
 - ii. an order to seize the infringing products **(1 mark)**;
 - iii. an order to seize materials and implements predominantly used in order to manufacture the infringing goods **(1 mark)**, if their owner knew the effect for which such use was intended or if such effect would have been obvious in the circumstances **(1 mark)**;

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- iv. an order imposing other sanctions **(1 mark)** appropriate in the circumstances under the circumstances which are provided by the law of the Member state in which the acts of infringement or threatened infringement are committed, including its private international law **(1 mark for discussion about sanctions under national law).**
- b) (i) Article 19 CDR: Making **(0.5 marks)**,
(ii) ...offering **(0.5 marks)**,
(iii) ...putting on the market **(0.5 marks)**,
(iv) ...importing, exporting **(0.5 marks if say both)**,
(v) ...or using a product **(0.5 marks)**
(vi) ...in which the design is incorporated or to which it is applied, or stocking **(0.5 marks)** such a product for those uses.

(3 marks)

Total: 10 marks

Question 9

You receive the following email from one of your clients. Make notes that could form the basis of a response:

"I have, as you know, a UK registered design for my product. It's been doing very well in the marketplace and I'm selling lots of products to that design. However, I have just received a query from a large company who want to be given permission to use my design – they want to include it in the systems they sell. They want to be the only ones allowed to use it. On the face of it, this sounds appealing as I'm considering closing my factory soon so I can concentrate on other things. However, I might want to manufacture it again later so don't want to give up all rights to the design. I don't really understand what implications this might have on my business. Can you please explain:

- a) whether I can authorise them alone to use my design, **3 marks**
- b) what I should now do to arrange this, and **2 marks**
- c) what advantages or disadvantages this would give me or them?" **5 marks**

Total: 10 marks

Answer

Half marks may be awarded where candidates have not been precise

- a) Section 15C:
- (i) The proprietor of a UK registered design can license use of that registered design (Section 15B RDA) to someone else **(0.5 marks)**
 - (ii) ...terms to be agreed between the parties **(0.5 marks)**
 - (iii) The proprietor can exclusively license use under Section 15C **(0.5 marks)**,

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- (iv) ...authorising the licensee to the exclusion of all other persons, including the person granting the licence **(0.5 marks)**,
 (v) ...to exercise a right that would otherwise be exercisable exclusively by the proprietor of the registered design **(1 mark)**
- b) Section 15C:
- (i) The licence must be in writing signed by or on behalf of the proprietor **(1 mark)**
 - (ii) He should record the licence at the UKIPO **(1 mark)**
- c) Section 24F
- (i) The exclusive licensee would get the same rights against any successor in title bound by the licence as he has against the person granting the licence. **(1 mark)**
 - (ii) Exclusive licensee has, except against the registered proprietor, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment. **(1 mark)**
 - (iii) His rights and remedies are concurrent with those of the registered proprietor **(1 mark)**
 - (iv) Where proprietor/exclusive licensee brings infringement and they have concurrent rights of action **(0.5 marks)**, each may not, without the leave of the court **(0.5 marks)**, proceed with the action unless the other is either joined as a claimant **(0.5 marks)** or added as a defendant **(0.5 marks)**. **(2 marks total)**
 - (v) But a registered proprietor or exclusive licensee who is added as a defendant is not liable for any costs in the action unless he takes part in the proceedings. **(1 mark)**
 (This does not affect the granting of interlocutory relief on the application of the registered proprietor or an exclusive licensee.)

NB. A sole licence would be a possibility but is not on the syllabus. Up to **1 mark** is available for mentioning/explaining this option. Marks are available only up to the maximum shown for each section.

Total: 10 marks

Question 10

You have been contacted by Bob Smith, an individual who filed his own application for a Community Registered Design a few years ago. He tells you he has been enjoying success in selling his product and that he hadn't really thought about his design registration until one of his customers asked him about it. This spurred him into wondering if there was anything else he still needed to do, or whether his responsibility had ended when his design was registered. He told you he'd left the 'administration' to his wife, but she'd been ill over the last few months. He looked at the online register last week and saw his registration had lapsed. He tells you he filed his design application on 7 January 2011.

- a) Make notes explaining to Bob why his registration has lapsed **3 marks**
- b) Advise him what actions he needs to take and by when to get his registration back **7 marks**

Total: 10 marks

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Answer

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- a)
- (i) Application filed 07/01/11 and initially lasts 5 years **(0.5 marks)** (Article 12 CDR),
(ii) so first renewal fee would be due by 07/01/16 (or 31/01/16 as can pay up until end of the month) (Article 13 CDR) **(0.5 marks)**
 - (iii) There's a 6-month grace period i.e. by 31/07/16 **(0.5 marks)**
(iv) ...in which, after the first month, the fee can still be paid with a surcharge (Article 13 CDIR) **(0.5 marks)**
 - (v) If the renewal fee is not paid on time **(0.5 marks)**,
(vi) ...the registration expires (Article 22 CDIR) **(0.5 marks)**
- b)
- (i) Can request restitutio in integrum **(0.5 marks)**
(ii) within max 12 months from due date i.e. by 31/01/17 **(0.5 marks)**
(iii) and within 2 months of the cause of non-compliance (i.e. from when realised last week) **(0.5 marks)**
(iv) i.e. final date will be sometime mid-December 2016 (Article 67 CDR) **(0.5 marks)**
 - (v) Need to demonstrate took "all due care" **(1 mark)**
(vi) – he's an individual whose wife normally looked after that side of things but had been ill – possibly sufficient in the circumstances, but maybe unlikely given there are no external circumstances **(1 mark for reasonable discussion/comment on chance of success)**
 - (vii) Need to pay fee **(0.5 marks)**
(viii) ...+ surcharge **(0.5 marks)**
(ix) ...+ re-establishment fee **(0.5 marks)**
(x) ...+ make application in writing **(0.5 marks)**
(xi) ...and include grounds stating the facts of the case **(1 mark)**

Total: 10 marks

Question 11

- a) You receive a query from a company, Go Away! Ltd, that has produced a pack for sightseers for various UK cities. The pack includes:
- a guidebook showing and detailing important landmarks,
 - a CD or MP3 that they can listen to whilst walking around a city, and
 - a DVD or MP4 that they can watch either before they go as preparation for their visit, or afterwards by way of a reminder of their trip.
- Discuss what copyrights might subsist in the pack and identify the first owner of each copyright that subsists. (There is no need to consider whether the first owner is employed or whether there are any agreements in place relating to ownership or use).
- 9 marks**
- b) How is joint authorship defined in *Section 10 "Works of joint authorship"* CDPA?
1 mark

Total: 10 marks

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Answer

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a) Section 9 CDPA:

Book

- (i) Textual content – author(s) **(1 mark)**
- (ii) Photos – author(s) i.e. photographer(s) **(1 mark)**
- (iii) Typographical arrangement – publisher(s) **(1 mark)**
- (iv) Any graphic artwork – author(s) i.e. artist **(1 mark)**

Sound recording

- (v) CDMP3 Recording - Producer(s) **(1 mark)**

Film

- (vi) DVD/MP4 - Producer and principal director (who may be the same) **(1 mark)**

Packaging

- (vii) Text – author(s) **(1 mark)**
- (viii) Graphics – author(s) i.e. designer(s) **(1 mark)**
- (ix) Shape/product – author(s) i.e. creator(s) **(1 mark)**

b) A work produced by collaboration of two or more authors in which the contribution of each author is not distinct from that of the others. **(1 mark)**

Total: 10 marks

Question 12

a) Your client creates and produces items of snack foods in his small, family run factory in Scotland. He has recently created a range of “inside out” snack bars, which are available in a variety of interesting shapes. He based his bars on puddings onto which a sauce is normally poured, but has instead placed the liquid in the middle of his bars. His range includes a fruit crumble bar with custard inside, and a toffee flavoured bar with sticky toffee sauce in the middle. He considers the gooey filling to be an important feature. He has obtained a Community Registered Design but wants to know your opinion on its validity as he thinks it may be challenged. Write notes on whether you think his products fall within the definitions of a “design”, “product” and “complex product” as specified in the CDR, and comment on whether the snack bars meet the requirements for protection set out in *Article 4 “Requirements for protection”* CDR.

9 marks

b) Your client has other products in which he incorporates a secret, unusual ingredient, and he wants to know if he has copyright protection in his recipe. Comment on whether you think any protection is available under the CDPA.

1 mark

Total: 10 marks

Answer

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NB. This question is based on the *Biscuits Poul v OHIM (as the EUIPO was then known)* case (T-494/12) of November 2014, but marks are given for sensible

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discussions/conclusions irrespective of whether the candidate was familiar with the case or not.

a) Article 3 CDR:

(i) “design” is the appearance of whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. **(1 mark)**

(ii) A cake could have features that are contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation and so a cake could be a design protected as a design under the CDR **(1 mark)**.

(iii) Although the filling is a key part of the product, this cannot be regarded as part of the design **(1 mark)**,

(iv) ...because it is internal and the appearance of the product will be of the cake in an uneaten form **(1 mark)**

(v) The design is therefore limited to the outward appearance of the cake itself. You are told the cakes are shaped, so there may be protectable features here. **(1 mark)**

(vi) “product” means any industrial or handicraft item including parts intended to be assembled into a complex product, packaging, get-up etc. **(1 mark)**.

(vii) So the cake and its wrapping, packaging, and any logos etc. could be protectable. **(1 mark)**

(viii) “complex product” means a product which is composed of multiple components which can be replaced permitting disassembly and re-assembly of the product **(1 mark)**.

(ix) (This was discussed in the “Biscuits” case.) The cake and liquid filling do not form a complex product because there can be no disassembly/reassembly of the cake **(1 mark)**.

b) (x) Since copyright protects the expression of an idea **(0.5 marks)**,

(xi) the recipe as written down may be protected, but not the method/process by which it is actually made **(0.5 marks)**.

Total: 10 marks