

D&C 2011 Examiner's Comments

Unfortunately it is necessary to point out yet again that answers or parts of answers that are illegible or otherwise unintelligible get no marks. There is an equally unfortunate tendency for some candidates to challenge the facts they are given in the questions, rather than work with them. Spending time simply discussing or doubting given facts merely wastes time.

With honourable exceptions there was too often lack of precision about legal provisions. An approximation to the law will not do; it will almost certainly be wrong.

Q1. One example of this lack of precision is in the answers to parts a) and c). The rights concerned run to the end of the year; only a minority of candidates mentioned this.

In a) too many candidates failed to realise (or to make it clear they knew) that copyright does not cease. It continues for the full term, but industrial exploitation (as defined by SI) does not infringe.

In c) there was need to distinguish between authorship where the contributions of the authors are indistinguishable (end of the year 70 years after the death of the last known author to die) and authorship where they are separable (separate terms). For completeness mention that for computer-generated works the term is 50 years not 70.

Q2. This question, from its very wording, is calling for a precise rendition of the provisions. Therefore to say in a) that the right comes into existence, for example, "when the work is made" is not good enough; "when recorded in writing or otherwise" is the answer, and too many candidates forgot the "or otherwise". A similar attention to detailed wording was also needed in b) and above all in c). The EC definition is complex and difficult, and any attempt to simplify or paraphrase is doomed.

Q3. This question was on the whole well answered, except that very few candidates observed that they were asked to write a letter explaining the pros and cons. In contrast to Q2, merely quoting legal provisions is not appropriate, because it is explanatory skill that is being looked for here. Good candidates drew attention to the narrower subject-matter that is protectable by UDR compared to registration, and to the danger of third-party activity if the grace period before registration is used.

Q4. Surprisingly, this question was not well answered. Too many candidates forgot the most basic circumstance, namely claiming priority. Far too many alleged that there was a general grace period of twelve months, rather than one which relates to disclosure by the designer. Division was forgotten by many (though the deemed date is the same as the parent, the application is one filed later at the UKIPO). Confidential disclosure was mentioned by some, but that does not amount to publication; and modification does not involve an application filed later at the UKIPO. Careful study of the RDA on these very important provisions is indicated.

Q5. This straightforward question posed little difficulty, except to some extent in parts d) and e). It is necessary to remember for d) that the individual can come from a

qualifying country as defined in S217(3) or by virtue of SS(4), and for e) that there is a modification to the already complex provision of S217(3) in SS(5). So, completely full marks were rare.

Candidates were not expected to recite the list of countries having reciprocal arrangements. Had this been required it would explicitly have been asked for.

Q6. This question related to legal rights in the hands of the proprietor: the acts prohibited to others as listed in A19(1) CDR. Discussion of different overall impression and suchlike was completely irrelevant.

In the second part of the question, too many candidates said that exhaustion followed first sale in the EC. Exhaustion arises upon first putting on the market in the EC by the proprietor or with his permission.

Q7. This question required logical thought in order to arrive at a clear and correct answer. It did not require discussion of whether or not there had copying, or whether X's design was original. Candidates must accept what they are told in the text.

In part a), the key lies in S1B(6)(d), which candidates had already met in Q4. Y's registration is therefore not prior art and X's is valid. Y's is liable to revocation by virtue of earlier publication by X and/or because he is not the proprietor. For full marks, mention that the specification is not limiting.

In b), Y's registration is the earlier, but X has sold before the date, so both registrations are revocable. Both parties have a valid unregistered right since both were original, but neither infringes because there was no copying. As one candidate justly remarked, a curious situation.

Q8. There were good discussions of the "must fit" problems arising from the need of the dolls' clothes to fit because there is only an exclusion if the fit is so that function can be performed – possibly not, here, because on an inanimate object clothes are merely decorative, but on the other hand there is the function of covering – and from the adaptation of the dolls' fingers to hold things – yes. There were also good discussions of the novelty or lack of it of the items to be held.

Important to note that under the Community Regulation there is no distinction between the qualities of a design protected by registered and unregistered rights; and that Community unregistered rights do not come into existence until first made available, as defined.

Q9. This question was primarily directed towards a discussion of the practical value of the various possibilities for protection, and how they were to be handled by the representative, rather than just a list of those possibilities. Too many candidates did not respond to that. For example, each individual hand-painted bear attracts copyright, but what use is that to the author? Only if one particular pattern is adopted for mass-production. Unregistered rights not available under the CDPA for colourations (but are under the CDR); Registration is possible, but for what? Maybe for a bear with a white bandana head-covering, disclaiming the shape of the bear? Marks were principally given for this sort of discussion, and an appreciation that available rights can be of variable value, or none.

Q10. Very few candidates tackled this straightforward question. Those who did, demonstrated a good awareness of the prohibited activities, but did not always stress that an essential condition for so-called secondary infringement is knowledge or belief on the part of the infringer. There was also confusion between this and the “defence” of innocence: here, knowledge is of the essence in establishing the existence of infringement; once established, there is infringement with all the sanctions that that implies.

Q11. There was a lot of guesswork in the answers given, showing an ignorance of an important practical remedy in the Community registration system. Those familiar with re-establishment under the EPC will note the contrast that here re-establishment (restitutio) is available not only to the proprietor or applicant but also to any other party to the proceedings. All the necessary details are to be found in A67 CDR, and study of them is recommended.

Q12. This question dealt with procedure in applying for a UK Registered Design, and required a basic but thorough knowledge of rules 4(1), 4(7) 5(2)(3), 9(3) and 10 of the Registered Design Rules, which an unfortunate number of Candidates failed to demonstrate.