

FC4 (D&C) UK Patent Law
Mark Scheme 2018

In this mark scheme the following annotations will be used:

- **UDR:** Unregistered design right (UK)
- **CUD:** Community unregistered design
- **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

Knowledge of Section/Article numbers is not required.

Section A

Question 1

With regard to *Article 50 CDR 'Deferment of publication'* and *Article 15 CDIR 'Deferment of publication'*,

- a) describe the process for deferring publication of a Community registered design, including any relevant time limits, and
- b) outline the procedure for remedying deficiencies in a publication request (i.e. for a design subject to deferment), including any relevant time limits.

5 marks

1 mark

Total: 6 marks

Answer

- a) CDR50, CDIR 15: Can request deferred publication, for up to 30 months **(0.5 marks)** from the date of filing or, if priority is claimed, from the date of priority **(0.5 marks)**.

Deferment request must be made when filing the application/on filing **(0.5 marks)** full publication fee is not required on filing/lower deferment fee ("additional fee for deferment") **(0.5 marks)**.

Publication request must be made at the latest three months before **(0.5 marks)** the 30-month deferment period expires/ or earlier when publication required **(0.5 marks)**.

It is necessary to pay the publication fees **(0.5 marks)** for each design to publish / multiple fees for multiple designs **(0.5 marks)**.

Where a specimen has been filed, need to file a representation of the design **(0.5 marks)**. For multiple designs, not all designs need to publish at the same time / specify which are to be surrendered or continued to be deferred **(0.5 marks)**.

5 marks

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- b) CDIR 15: The office shall call upon the holder/ invitation by office **(0.5 marks)** to remedy any deficiencies within a specified time limit which shall not expire after the 30-month deferment period **(0.5 marks)**.

1 mark

Total: 6 marks

Question 2

With reference to the CDPA, what acts can be done without infringing UDR?

Total: 5 marks

Answer

(Note: Section numbers are provided for revision purposes; candidates are not required to know article/section numbers.)

CDPA 244A (a) an act which is done privately **(0.5 marks)** and for purposes which are not commercial **(0.5 marks)**;

CDPA 244A (b) an act which is done for experimental purposes **(0.5 marks)**; or

CDPA 244A (c) an act of reproduction for teaching purposes **(0.5 marks)** or for the purpose of making citations **(0.5 marks)** provided that—

(i) the act of reproduction is compatible with fair trade practice **(0.5 marks)** and does not unduly prejudice the normal exploitation of the design **(0.5 marks)**, and

(ii) mention is made of the source **(0.5 marks)**.

CDPA 244B (a) the use of equipment on ships or aircraft which are registered in another country **(0.5 marks)** but which are temporarily in the United Kingdom **(0.5 marks)**;

CDPA 244B (b) the importation into the United Kingdom of spare parts or accessories for the purpose of repairing **(0.5 marks)** such ships or aircraft;

CDPA 244B (c) the carrying out **(0.5 marks)** of repairs on such ships or aircraft.

Total: (maximum) 5 marks

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Question 3

With regard to *Article 67 CDR 'Restitutio in integrum'*, consider the situation that the Community registered design lapsed for failure to pay a renewal fee. Restitutio is available as a remedy for the proprietor of the lapsed Community registered design.

Explain the procedure for restitutio and the requirements the proprietor needs to satisfy before the EUIPO can issue a decision on reinstating the Community Registered Design.

Total: 9 marks

Answer

CDR 67:

Qualification: Non-payment of the renewal fee and late payment fee **(0.5 marks)** must have had the direct consequence of causing the loss of rights, which is the case due to missed renewal / restitutio is now the only remedy **(0.5 marks)**. The proprietor needs to prove that he was unable to pay the fee in spite of all due care **(1 mark)** required by the circumstances having been taken **(1 mark)**.

Deadlines: The deadline for requesting restitutio is two months **(1 mark)** of the removal of the cause of non-compliance **(0.5 marks)** with the time limit, i.e. from when he became aware/found out about the loss **(0.5 marks)**. There is a maximum 12 months after expiry of the missed renewal fee **(0.5 marks)** deadline (not the grace period **(0.5 marks)**).

Acts: The request must be filed including the grounds on which it is based **(0.5 marks)** and setting out the facts (evidence) on which it relies **(0.5 marks)**. The omitted act must be completed within this period **(0.5 marks)** i.e. payment of the renewal fee **(0.5 marks)** and additional fee (or "fee for the late payment of the renewal fee") **(0.5 marks)**. A re-establishment fee (or "fee for restitutio in integrum") must be paid **(0.5 marks)**.

Total: 9 marks

Question 4

a) Give three different filing strategies for obtaining registered design protection in the EU and US so an equivalent scope of protection is obtained in each territory.

3 marks

b) Give one advantage or disadvantage for one of the identified filing strategies.

1 mark

Total: 4 marks

Answer

A full mark should be awarded to each sensible and correct answer that provides a different route to registration.

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a) Max. three marks from, e.g.:

- File separate applications in the EU and US e.g. on the same day **(1 mark)**
- File an application in one country e.g. EU and file an application in the other e.g. US claiming priority within 6 months (a single mark is available for stating either EU >US or US >EU. There are not two marks available for stating both opposites). **(1 mark)**
- File an international Hague application designating the EU and US **(1 mark)**
- File separate national applications in the US plus each EU country **(1 mark)**

b) Any reasonable advantage/disadvantage **(1 mark)** e.g.

- Difficulty of coordinating multiple same-day filings abroad
- Hague is cost effective
- Claiming priority splits/defers costs
- For US, Hague is complex

Total: (maximum) 4 marks

Question 5

With reference to *Section 213(3) CDPA 'Design right'*, in what aspects of an article does design right not subsist?

Total: 6 marks

Answer

Section 213(3) CDPA: Design right does not subsist in

- (a) a method or principle of construction **(0.5 marks)**,
- (b) features of shape **(0.5 marks)** or configuration **(0.5 marks)** of an article which
 - (i) "must fit" **(0.5 marks)** / enable the article to be connected to **(0.5 marks)**, or placed in, around or against **(0.5 marks)**, another article so that either article may perform its function **(0.5 marks)**, **[maximum of 1.5 marks for paragraph (b) (i)]** or
 - (ii) "must match" **(0.5 marks)** / are dependent upon the appearance **(0.5 marks)** of another article of which the article is intended **(0.5 marks)** by the designer **(0.5 marks)** to form an integral **(0.5 marks)** part **[maximum of 2 marks for paragraph (b) (ii)]**, or
- (c) surface decoration **(1 mark)**.

Total: (maximum) 6 marks

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Question 6

Including your reasoning, explain whether the following threats constitute actionable threats under *Section 26 RDA 'Remedy for groundless threats in infringement proceedings'* by the persons mentioned below.

Assume a threat of bringing infringement proceedings has been made.

- a) A threat made to a manufacturer in relation to making a product. **1 mark**
- b) A threat made to a manufacturer in relation to selling a product. **1 mark**
- c) A threat made to a seller in relation to selling a product. **1 mark**
- d) A threat made to an importer in relation to preparing to import a product. **1 mark**

Total: 4 marks

Answer

- a) No – threatening re manufacture is not actionable **(1 mark for reason)**
- b) No – threatening a primary actor is not actionable **(1 mark for reason)**
- c) Yes – threatening re a secondary act to a secondary actor is actionable **(1 mark for reason)**
- d) No – intention to carry out such an act is non-actionable **(1 mark for reason)**

Total: 4 marks

Question 7

An application for a Community registered design was filed on 17 April 2018. An application for a UK national registered design was filed on the same date. Both are registered.

Ignore office closed days, such as public holidays or weekend days.

- a) **When is the first renewal fee due, and when does the renewal grace period end, for:**
 - i) **the UK registration?** **1 mark**
 - ii) **the Community registration?** **1 mark**
- b) **Give a reason why the proprietor might want or need both registrations in the UK.** **1 mark**

Total: 3 marks

Answer

a) RDA s.8: 17 April 2023 **(0.5 marks)**; 17 October 2023 with 6-month grace period **(0.5 marks)**;

1 mark

b) CDR 13: Community: 30 April 2023 **(0.5 marks)**; 31 October 2023 with 6-month grace period) **(0.5 marks)**.

1 mark

c) 1 mark for a sensible suggestion e.g. legal certainty of UK registration regardless of post-Brexit status in UK of CRD.

1 mark

Total: 3 marks

Question 8

Explain how the rights of an exclusive licensee of a copyrighted work compare to the rights of a copyright owner.

3 marks

Answer

CDPA 101: An exclusive licensee has, except against the copyright owner, the same rights and remedies in respect of matters occurring after grant of the licence as if the licence had been an assignment **(1 mark)**. His rights and remedies are concurrent with those of the copyright owner **(1 mark)**. In an action brought by an exclusive licensee a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner **(1 mark)**. CDPA 102: An action for infringement in respect of which both have concurrent rights of action one may not, without the leave of the court, proceed with the action unless the other is either joined as a plaintiff or added as a defendant, in which case the added defendant is not liable for costs unless he takes part in the proceedings **(1 mark)**.

Total: (maximum) 3 marks

SECTION B

Question 9

Jill is an artist who paints unique space-themed paintings of imaginary alien landscapes. For several years she worked at a studio to produce a large number of paintings that were sold by the studio, for which she received a proportion of the amount they sold for. After developing and improving, she started work from her home and now sells her home-created paintings online.

- a) Write notes advising Jill of copyright she owns in relation to the above.**

5 marks

She was recently speaking with Joe, a very wealthy investor, who is interested in helping Jill commercialise her work. Joe has offered to pay Jill well for providing prints of her paintings to numerous art outlets throughout the UK. Jill is very interested as she would like to take early retirement, but is unsure what rights she will retain or give away.

- b) Write notes advising Jill of her options in relation to rights she would retain or give away when working with Joe to commercialise any copyright she may own.**

7 marks

Jill enters into an agreement with Joe and he provides prints of some of Jill's works to various retail outlets. When out shopping one day, Jill is surprised to see some space-age landscape prints that are reminiscent of her own paintings and signed by one of her ex-colleagues who used to work with her at the studio. Jill storms angrily into Joe's office.

- c) Ignoring any remedies that may be obtainable, discuss what unauthorised acts may have taken place, what action can be taken, and against whom. Discuss how Joe may take action.**

8 marks

Total: 20 marks

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Answer

a) CDPA 1: Copyright subsists in original artistic works **(0.5 marks)**. CDPA 4: Presumably Jill's space landscape pictures meet this by being a work of artistic craftsmanship **(0.5 marks)**.

CDPA 11: Jill, as the artist and creator of the paintings, would be the first owner, and presumably Jill still owns the copyright in her current/recent works **(1 mark)**. Jill made her early works for a studio to sell. Was she employed or was there some agreement? She may or may not still own the copyright in those **(1 mark)**.

CDPA 12: Copyright lasts life + 70 years, so none of the copyrights have expired **(1 mark)**.

CDPA 2: Copyright owner has exclusive right to do restricted acts **(1 mark)**.

5 marks

b) CDPA 16, 90, 92: Jill could assign **(0.5 marks)** or license rights to Joe **(0.5 marks)** in some or all of her paintings for which she still owns the copyright or has some agreement with the studio permitting her to do so **(1 mark)**. Jill could enter a joint ownership agreement with Joe **(1 mark)**.

If Jill assigns the rights, she loses all rights in the works that are assigned **(1 mark)**. If Jill licenses the rights she can license Joe to do any/all of the acts restricted by copyright (section 16) **(1 mark)**. Jill could grant Joe an exclusive licence **(1 mark)**. Dependent on the terms of the licence, Jill could retain rights to the works unless it is an exclusive licence in which case she wouldn't **(1 mark)**.

7 marks

c) CDPA 16: Unauthorised copying of the work and issuing copies to the public is restricted **(1 mark)**. CDPA 23: Dealing with infringing copies is secondary infringement **(1 mark)**.

CDPA 96: (c) infringement is actionable by the copyright owner **(1 mark)**. We do not know details of the agreement Jill made with Joe, and so have to find out – was this an assignment, licence, exclusive licence, and for what **(1 mark)**?

The question states that Jill has entered an agreement, but is unclear on the type of agreement. If the relevant agreement is a licence, only Jill can take action **(1 mark)**. In the case of a transfer or joint ownership of the relevant right, Joe can take action **(1 mark)**. CDPA 101: If Joe is an exclusive licensee, he can take action **(1 mark)**.

Action could be taken against the sellers, manufacturers, distributors etc. for any works Joe owns or for which he has an exclusive licence **(1 mark)**.

8 marks

Total: 20 marks

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Question 10

Abigail is a commercial handywoman and entrepreneur. A number of years ago she devised an electronic scoreboard displaying her top ten customers. She could not think of a use for the electronic scoreboard and kept it secret. Later, she made a similar electronic display on the request of one of her clients, Tara. Tara is the owner of a very popular shop in England. Tara used Abigail's display, as supplied by Abigail and without further modification, to show her top ten selling items. Tara found that sales of the items listed on the display increased. Tara now has five stores nationwide, all using the same display.

Tara held a launch party for her latest store, and publicised it widely. Nicky, the owner of a music store, approached Tara angrily at the launch. Nicky told Tara that she should not be using the display because Nicky has a UK registered design for a display that shows the top ten music chart. Nicky sends Tara an aggressive letter accusing her of infringing her rights.

Considering only registered design rights:

- a) **Discuss on what grounds Nicky might have a cause of action against Tara.**
5 marks

Tara tells you she has nothing to worry about because she has been using the display for a long time.

- b) **Assuming Nicky's registration covers Tara's display, explain under what circumstances prior use rights mean that the display design will not infringe Nicky's rights.**
5 marks

Tara tells you she had no idea about Nicky's designs as she legally obtained her designs from Abigail.

- c) **Advise Tara whether or not she has any defences to infringement.**
4 marks

- d) **Advise Tara under which circumstances she has, or has not, committed any criminal acts.**
4 marks

Tara tells you she was upset by the tone of Nicky's letter.

- e) **Write notes for a meeting on what actions Tara might be able to take against Nicky.**
2 marks

Total: 20 marks

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Answer

- a) Allow one mark each for answers that indicate appreciation of the following points:
- Infringement only as of date of registration
 - Infringement only if registration in force
 - Infringement requires at least similar overall impression
 - Infringement judged against depiction of registration, not Nicky's own product
 - Infringement only if RDA 7A exceptions do not apply

E.g.: RDA 7: It's unclear how similar Nicky's and Abigail's designs are. How significant is it what top ten is being displayed and are there other differences **(1 mark)**? If Nicky has a valid registration, use of a product design that creates the same overall impression on an informed user would be an infringement **(1 mark)**. RDA 7A lists various exceptions, but none apply in this case. Use of the display is not private and is commercial **(1 mark)**. RDA 7A: Nicky can only take action for infringement as of the date of registration **(1 mark)**. Check if registration is still in force **(1 mark)**.

5 marks

- b) RDA 7B: We do not know when Abigail's design became public **(1 mark)**? If Abigail's design was published by Tara or Abigail before Nicky's registration, Nicky's registration could be invalidated using the earlier publication **(1 mark)**. If Abigail's design predates Nicky's registration, Abigail will have prior user rights **(0.5 marks)** if she can prove **(0.5 marks)** prior use.

There is a possible scenario in which Tara publishes after Nicky's registration and cannot benefit from Abigail's pre-disclosure prior use rights because these rights do not include a right to licence another person to use the design **(1 mark)** or assign those rights because it was not used in the course of Abigail's business **(1 mark)**.

5 marks

- c) RDA24B: If Tara did not know about Nicky's registration **(1 mark)**, and had no reasonable ground for supposing the design was registered **(1 mark)**, she could, in infringement proceedings **(0.5 marks)**, use the defence of innocent infringement **(0.5 marks)**. Since she got the display from Abigail she may well not have considered anyone else would have a registration for it **(1 mark)**.

4 marks

- d) RDA 35ZA: If Tara knew/believed the design was registered **(1 mark)** and copies it intentionally **(0.5 marks)**, in the course of business **(0.5 marks)**, she could be committing an offence **(0.5 marks)** if she uses the display **(0.5 marks)**. However, Tara did not intentionally copy Nicky's design so there is no criminal offence **(1 mark)**.

4 marks

- e) RDA 26: Nicky's letter was clearly threatening and Tara is arguably aggrieved **(0.5 marks)**. Tara is not apparently making/importing the displays **(1 mark)**, and so she may have a case for a groundless threat action against Nicky **(0.5 marks)**.

2 marks

Total: 20 marks

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Question 11

Roisin files an application to register an original design in the Republic of Ireland on 9 April 2018. She contacts you wanting to extend protection for the design throughout Europe. She already filed a new Community multiple design application for three product designs, including the original design, on 10 September 2018. Roisin struggled with filing the online application, and she was not sure she had handled the design drawings correctly, but, in a panic, she managed to file something and presumed it had been properly submitted.

Roisin then receives a notification from the EUIPO saying the representations for the first design could not be viewed; it appears the files may have been corrupt. The notification also indicates that Roisin paid the wrong fee for the second and third designs. Roisin contacts you for help. Roisin tells you she requires all three designs to be registered in the EU.

- a) Explain what effect the errors have on Roisin's multiple application and any actions Roisin needs to take to ensure the application proceeds to registration. In your answer include any relevant deadlines and any action the EUIPO will take.**

7 marks

Roisin also says she cannot see any mention of her earlier Irish design, although she assumed the EUIPO would conduct all necessary checks and know all about it, and given she paid these official fees she presumes this will sort itself out.

- b) Advise Roisin on any priority issues in connection with the earlier Irish design, including any relevant actions (stating deadlines) Roisin needs to take using the existing applications.**

9 marks

Roisin tells you she was keen to obtain a broad scope of protection and ensured this by selecting a different classification for each of the three designs.

- c) Advise Roisin on the possible problems with such a strategy and any actions to be taken?**

4 marks

Total: 20 marks

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Answer

a) First design: CDIR 10: no filing date will be awarded if application does not contain a representation **(1 mark)**. EUIPO sets a deadline of 2 months **(0.5 marks)** from receipt of the EUIPO's notification **(0.5 marks)**, the date the deficiencies are remedied will determine the filing date **(1 mark)**.

Second/third design: Assuming the representations are fine for these designs, a filing date will be assigned **(0.5 marks)** and the EUIPO will set a deadline of two months **(0.5 marks)** from the date of the notification **(0.5 marks)** to pay the outstanding fees **(0.5 marks)**.

For the first design, Roisin must file replacement representations by the deadline, otherwise the application for the first design will not be dealt with as a Community design; the fee paid will be refunded **(1 mark)**.

For the second and third designs, any outstanding fees need to be paid **(1 mark)**.

7 marks

b) Did Roisin claim priority from the IE application in the Community application **(1 mark)**? CDIR 41: The priority period is 6 months **(0.5 marks)** from the filing date of the earlier/first design application **(0.5 marks)**, so the priority period expires 9 October 2018 **(0.5 marks)** so the filing date is within the priority period **(0.5 marks)**.

Priority claim is only available for the same design in the IE application **(0.5 marks)**. For any designs for which Roisin cannot claim priority, they only benefit from the filing date of the Community application **(0.5 marks)**. Different designs in the multiple application can have different priority dates **(0.5 marks)**.

CDIR 8: Roisin can add a priority claim within one month **(0.5 marks)** of filing the application **(0.5 marks)**, i.e. by 10 October 2018 **(0.5 marks)**. She must submit the priority date **(0.5 marks)**, priority application number **(0.5 marks)**, and country of filing **(0.5 marks)** ["date, number, country" suffices for the marks]. She must file a certified copy of the priority application (and application number) **(0.5 marks)** within 3 months of the filing date **(0.5 marks)**, i.e. by 10 December 2018 **(0.5 marks)**.

9 marks

c) The EUIPO may consider the classifications do not correspond to the designs **(0.5 marks)**. In practice, the EUIPO may suggest or require a re-classification **(0.5 marks)** if the designs should belong to the same Locarno class. The EUIPO may object that the three designs do not qualify for a multiple application if they do not belong to the same Locarno classification **(0.5 marks)** and set a 2-month time limit **(0.5 marks)** for responding. Any divided applications will get the filing date of the earlier Community application filed **(1 mark)**.

In that case, Roisin would have to divide the application to maintain all registrations **(0.5 marks)** and pay the additional filing fees / (minus amounts already paid) for each divided application to be maintained **(0.5 marks)**

4 marks

Total: 20 marks

Question 12

In answering the questions below, ignore any registered rights and trade marks.

Taylor is a British writer and publisher, and keen on protecting her ideas to prevent others copying them. She found that she seems to make certain 'buzzwords' popular by using them in her publications. These buzzwords are existing words that she has used in previously unrelated contexts and that she thinks will catch on, but she is keen to prevent anyone else using them. She often uses the words in speech bubbles, and also in combination with a drawn little stick man figure that has become her insignia.

a) Advise Taylor on copyright she may own in the UK.

5 marks

b) Advise Taylor on design rights she may own in the UK.

4 marks

Kate is also a writer and publisher, and one of Taylor's competitors. Kate sees Taylor's designs and decides she would like to use a stick woman figure to identify her work, and so she creates her own and makes little stick figure bookmarks that she sells with her books. Taylor sees the stick figure bookmarks, and is annoyed because she thinks it is too close to her own image. Kate insists that Taylor has no case against her because stick figures have been widely used in various forms for a long time and she believes she is free to use her image.

c) Explain whether Kate is infringing, including whether she has any defences to infringement.

11 marks

Total: 20 marks

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Answer

- a) Copyright: CDPA 1, 4: A single word **(0.5 mark)** is unlikely to be an original **(0.5 marks)** literary work **(0.5 marks)** or typographical arrangement **(0.5 marks)** that could attract copyright protection. Probably unlikely that the word in a speech bubble is artistic either for similar reasons – not really an artistic/graphic work **(1 mark for reasonable argument even if conclusion differs)**. The combination of a word in a speech bubble with a stick man figure could be considered / is more likely to be a graphic work under CDPA 4; attracting copyright protection **(1 mark)**; artistic quality is irrelevant **(1 mark)**.
- b) UDR: CDPA 213: No UK UDR available for 2D works / surface decoration **(1 mark)**. CUD: CDR 3: 2D designs are permissible – any product design is eligible for CUD and “product” includes get-up, symbols etc. **(1 mark)**. CDR 11: So, providing design first made available to public within Community (likely since Taylor is British) **(0.5 marks)** within the last 3 years **(0.5 marks)**, CUD will subsist. Provided novel and individual character **(1 mark)**.
- c) Copyright: CDPA 16: it's an infringement of copyright to, inter alia, copy a protected work **(1 mark)**. Kate has seen Taylor's work/bubble/stick man combination, but her version differs by using a stick woman figure (and maybe other elements – we do not know) **(1 mark)**. Copying has taken place if the whole or a substantial part has been reproduced **(1 mark)**. So has Kate copied a substantial part of Taylor's insignia? Arguably yes if it was original to combine the elements together and if the stick woman vs stick man is not very significant, but we do not know **(1 mark for reasonable discussion)**. CDPA 17: Copying a 2D work in 3D and making a copy in any material form are also infringements **(1 mark)**. So Kate may be infringing Taylor's copyright in both forms **(1 mark)**.

Kate says stick figures are well known. If Taylor doesn't have an original work she doesn't have an enforceable copyright **(1 mark)**. Depends how significant the stick figure is and how closely Taylor's work has been copied **(1 mark)**.

CUD: CDR 19: it's an infringement to, inter alia, use Taylor's work if CUD subsists **(1 mark)**, but only if Kate copied – which, arguably, she did as she has seen Taylor's designs **(1 mark)**.

Kate considers stick figures are well known. It depends how significant the stick figures are and how closely Taylor's work has been copied **(1 mark)**.

Total: 20 marks