

**FC4 (D&C) UK Patent Law  
FINAL Mark Scheme 2019**

**In this mark scheme the following annotations will be used:**

- **UDR:** Unregistered design right (UK)
- **CRD:** Community registered design
- **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**

Your client calls you: she signed a deal and she has, effective today, acquired six CRDs. Your client instructs you to file UK registered designs claiming the priority of each CRD. You inspect the EUIPO register, which shows that the CRDs were registered with immediate publication on different days, each about three months ago, each in a different class. The previous owner is listed on the register for each CRD.

- a) **Advise your client of the options and deadline for applying for UK registered designs claiming the priority of the CRDs. Include all information required for the priority claim.**

**8 marks**

- b) **Advise your client on recommended actions in respect of the CRDs she now owns, and what you require from her to carry out these actions.**

**4 marks**

**Total: 12 marks**

**Answer**

- a) The UK registered design application for each design should be filed within the priority period which is six months from each Community filing date **(1 mark) (i)**, and which is still possible as the filing dates were about three months ago/less than six months ago **(1 mark) (ii)**. One option is to file 6 separate applications **(1 mark) (iii)**. Advise of the option of filing a multiple **(1 mark) (iv)** application, as the UKIPO does not require identity of class/same class (different classes can be combined in a multiple application).

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The priority claim should include the date of the priority application **(1 mark) (v)**, the country/jurisdiction [EU/CRD] **(1 marks) (vi)**, and priority application number **(1 marks) (vii)** for each design.

The deadline for providing a certified copy will be 3 months from the date of filing **(1 mark) (viii)**.

**8 marks**

- b) The change of ownership should be recorded at the EUIPO by way of a formal request **(1 mark) (ix)**. The request requires evidence of the transfer (e.g. an assignment document) **(1 mark) (x)**, and a fee per design **(1 mark) (xi)**. All designs can be included in one recordal request **(1 mark) (xii)** (although fees are payable for the first 5 designs). Also advise the client to monitor the next renewal fee **(1 mark) (xiii)** even if this is not due soon.

**(5 marks available) maximum of 4 marks**

**Total: 12 marks**

**Question 2**

With regard to *Article 5 of the Berne Convention for the Protection of Literary and Artistic Works*, set out what rights (“Author Rights”) authors enjoy under the Berne Convention in respect of works for which they are protected in the Union, relative to the country of origin.

**Total: 5 marks**

**Answer**

Art 5(1) BC: *Authors shall enjoy, in respect of works for which they are protected under this Convention,*

- in countries of the Union other than the country of origin **(1 mark) (i)**
- the rights which their respective laws grant to their nationals **(1 mark) (ii)**,
- now **(1 mark) (iii)** or hereafter **(1 mark) (iv)**
- as well as the rights specially granted by this Convention **(1 mark) (v)**

**Total: 5 marks**

**Question 3**

With regard to *section 226 CDPA 'Primary infringement of design right'* and *section 227 CDPA 'Secondary infringement...'*,

- a) Explain what is meant by “reproduction” of a design.

**3 marks**

- b) Set out what the Act defines as the exclusive rights of a design right owner.

**3 marks**

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- c) Explain how these exclusive rights of a design right owner may be infringed.  
5 marks

Total: 11 marks

Answer

- a) s.226(2) CDPA: Reproduction of a design by making articles to the design means:
- copying (1 mark) (i) the design so as to produce articles (1 mark) (ii)
  - exactly (0.5 marks) (iii) or substantially (0.5 marks) (iv) to that design.
- 3 marks
- b) s.226(1) CDPA: The owner of a design right in a design has the exclusive right:
- to reproduce the design for commercial purposes (1 mark) (v)
  - by making articles to the design (1 mark) (vi), or
  - by making a design document recording the design for the purpose of enabling such articles to be made (1 mark) (vii).
- 3 marks
- c) s.226(3) / s.227(1) CDPA: Design right is infringed:
- by a person who without a licence/consent (0.5 marks) (viii) of the design right owner
  - s.226(3) CDPA: does (0.5 marks) (ix) or authorises (0.5 marks) (x) another to do anything which by virtue of s.226 is an exclusive right of the design right owner (0.5 marks) (xi).
  - s.227(1) CDPA:
    - imports into the UK (0.5 marks) (xii) for commercial purposes,
    - has in his possession (0.5 marks) (xiii) for commercial purposes or
    - sells (0.5 marks) (xiv), lets for hire (0.5 marks) (xv), offers (0.5 marks) (xvi), or exposes (0.5 marks) (xvii) for sale or hire, in the course of a business (0.5 marks) (xiii) an (...) infringing article.

(5.5 marks available) maximum of 5 marks

Total: 11 marks

Question 4

With regard to *section 35ZA RDA 'Offence of unauthorised copying etc. of design in course of business'*, state the defences to the offence of intentionally copying a design in the course of business.

Total: 3 marks

Answer

s.35ZA(4) and (5) RDA: It is a defence for a person charged with an offence (under s.35ZA) to show that

- the person reasonably believed that the registration of the design was invalid (1 mark) (i),
- the person did not infringe the design in question (1 mark) (ii), or
- reasonably believed that it did not infringe (1 mark) (iii).

Total: 3 marks

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**Question 5**

With regard to s.4 CDPA 'Artistic works',

- a) List what types of work are meant by the term "graphic work", and **5 marks**
- b) State what is meant by a "photograph". **4 marks**
- Total: 9 marks**

**Answer**

- a) "graphic work", includes:
- any painting **(0.5 marks) (i)**, drawing **(0.5 marks) (ii)**, diagram **(0.5 marks) (iii)**, map **(0.5 marks) (iv)**, chart **(0.5 marks) (v)** or plan **(0.5 marks) (vi)**, and
- any engraving **(0.5 marks) (vii)**, etching **(0.5 marks) (viii)**, lithograph **(0.5 marks) (ix)**, woodcut **(0.5 marks) (x)** or similar work **(0.5 marks) (xi)**.  
**(5.5 marks available) maximum of 5 marks**
- b) "photograph" means a recording of light or other radiation **(1 mark) (xii)** on any medium **(1 mark) (xiii)** on which an image is produced **(1 mark) (xiv)** or from which an image may by any means be produced, and which is not part of a film **(1 mark) (xv)**.
- 4 marks**  
**Total: 9 marks**

**SECTION B**

**Question 6**

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

Wholesome Chocolate is a manufacturer of a chocolate slab "Eden's Bliss". Eden's Bliss is a flat chocolate slab with a distinctive cloud silhouette. You consider the cloud silhouette a radical departure from rectangular chocolate slabs. Eden's Bliss is a huge commercial success.

Without your knowledge at the time, Wholesome Chocolate registered a CRD on 1 April 2014. Wholesome Chocolate was impressed with the simple registration process at the EUIPO and they have not had any correspondence with the EUIPO since then. The registration shows a single image, namely a colour photograph of a white chocolate slab with the distinctive cloud silhouette. The CRD is the only CRD owned by Wholesome Chocolate.

Recently, the supermarket chain Waistgrows launched a low-calorie confectionery range, FluffedUp. FluffedUp are flat white-chocolate slabs with foamy texture. The range was launched after a very short development time. The foamy texture requires manufacture without moulding. Rather, the FluffedUp slabs are manufactured by pouring chocolate on a cold surface to let it solidify. This process results in a cloudy silhouette. A survey shows that the cloudy silhouette is similar to the CRD. You also find out that the bars are manufactured in Ireland.

The FluffedUp slabs sell for about half the price of Eden's Bliss. Wholesome Chocolate's managing director approaches you and asks what can be done to remove the FluffedUp slabs from the market, given they are not exact copies.

- a) Advise on Wholesome Chocolate's position, and whether their CRD can be used against Waistgrows.**

**10 marks**

During a routine research of Wholesome Chocolate's CRD, you discover a blog entry on Foodle, a well-known food blog. The blog entry dates back to 2012 and shows a picture of product sample from Wholesome Chocolate, which is a white chocolate slab in the shape of a cloud. Compared side-by-side, the blog entry slab seems quite similar, if not identical, to Eden's Bliss. The blog entry has over 100 comments from around 2012 praising the radically unusual shape.

- b) Explain what impact the blog entry has on Wholesome Chocolate's options.**

**10 marks**

**Total: 20 marks**

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**Answer**

- a) Based on the information available, the CRD predates the FluffedUp bar as this was only launched recently/after a short development time **(0.5 marks) (i)** and so the FluffedUp bar does not seem to have a prior use defence **(0.5 marks) (ii)**. The CRD will be enforceable/actionable if in force **(0.5 marks) (iii)** so check/ensure that the registration is in force / renewal fee paid **(0.5 marks) (iv)**. The first renewal date was end of 30 April 2019 **(0.5 marks) (v)** which is five years after the filing date **(0.5 marks) (vi)**. If the renewal fee was missed, we are still within a six-month grace period **(0.5 marks) (vii)** which expires 31 October 2019 **(0.5 marks) (viii)**.

Given the survey, it can be assumed the FluffedUp bar provides the same overall impression on the informed user (other assumptions on this point, if plausible, will also be awarded marks) **(0.5 marks) (ix)**. The CRD provides a monopoly right **(0.5 marks) (x)** and so it is irrelevant if the design was copied or not **(0.5 marks) (xi)**. Recommend carrying out a test purchase as evidence of sale **(0.5 marks) (xii)**. Given the bars are manufactured in Ireland, Waistgrows is likely to be an importer **(0.5 marks) (xiii)** but we should reassure ourselves of this **(0.5 marks) (xiv)** to understand the threats position **(0.5 marks) (xv)**. Infringement action could be taken both against the manufacturer in Ireland **(0.5 marks) (xvi)** and/or the importer in the UK **(0.5 marks) (xvii)** because Ireland/UK are EU members **(0.5 marks) (xviii)**.

The infringement is in the course of business, so if Waistgrows copied the CRD intentionally **(0.5 marks) (xix)** (which we do not know) they may have committed a criminal offence / they may not have committed a criminal offence if the pouring process is not an intentional copying (any sensible conclusion to be awarded a mark) **(0.5 marks) (xx)**. **10 marks**

- b) The blog entry of 2012 predates the CRD and so is a prior disclosure **(0.5 marks) (xxi)** over 12 months **(0.5 marks) (xxii)** before the filing date in 2014 **(0.5 marks) (xxiii)** and so outside any relevant grace period **(0.5 marks) (xxiv)**.

With over 100 likes the disclosure is likely to have become known **(0.5 marks) (xxv)** in the normal course of business **(0.5 marks) (xxvi)** to the circles specialised in the sector concerned **(0.5 marks) (xxvii)** because the disclosure was made on a food blog, operating in the Community **(0.5 marks) (xxviii)**, as an Internet publication would be, and so the CRD seems invalid **(0.5 marks) (xxix)** for lack at least of individual character due to the similarity **(0.5 marks) (xxx)** if not for lack of novelty due to the identity in appearance **(0.5 marks) (xxxi)**.

Based on this new information, the CRD is vulnerable to an invalidity attack on the grounds of lacking novelty **(0.5 marks) (xxxii)** if the designs differ only in immaterial details **(0.5 marks) (xxxiii)** or individual character **(0.5 marks) (xxxiv)** if there is no different overall impression on the informed user **(0.5 marks) (xxxv)**. Waistgrows is likely to use the invalidity to improve their position **(0.5 marks) (xxxvi)**. A successful invalidation will be effective throughout the EU **(0.5 marks) (xxxvii)**. As such, attempting to enforce the CRD against Waistgrows may fail **(0.5 marks) (xxxviii)** and we do not know of any other design protection **(0.5 marks) (xxxix)**. It would appear we have no strong registered design right to block FluffedUp **(0.5 marks) (xxxx)**.

**10 marks**  
**Total: 20 marks**

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**Question 7**

A US attorney instructs you to register a design at the European Patent Office (EPO) based on US design application 29/864321 for a US applicant filed 8 May 2019. You carry out a pre-filing review: the representations show a door panel. The drawings include solid lines and dashed lines. The dashed lines are disclaimed and so you consider these do not constitute part of the filing. The only feature in solid lines is a rectangle, showing the silhouette of the door panel. The representations include intricate detail of unusual features which are all depicted by disclaimed, dashed lines. The description of US 29/864321 states *“Features shown in dashed lines are not claimed unless converted to solid lines, and demonstrate features in the possession of the applicant on the filing date. The applicant reserves the right to convert, during prosecution, any combination of dashed lines to solid lines in this application or a divisional application.”*

You explain the EPO does not handle designs, and the US attorney replies she requires a registration in Norway, as well as in the EU. Further, you explain that the EUIPO has given guidance that an EU design application cannot validly claim priority for features disclaimed in the priority filing.

The US attorney explains that eventually she intends to claim one of three specific door design variants that are depicted as broken lines in the generic door panel, but it is not clear yet which one of the variants is to proceed. The popularity of each variant is currently tested by the client in market research in the EU and in principle is public since May 2019. However, the market research is not known to rival suppliers in the Far East and it is important to the US attorney that the specific variants are not published via an official design register until May 2020. The US attorney may wish to abandon variants testing as unpopular before publication.

**Explain factors you would need to consider for a filing strategy, including issues of priority, validity, cost-effective filing strategy and obtaining a publication delay.**

**Explain cost-reducing options for covering Norway and the EU, and advise the client of any additional information you may require in this regard.**

**20 marks**

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**Answer**

Priority: The priority deadline expires 8 November 2019 **(0.5 marks) (i)**, 8 May 2019 + 6 months **(0.5 marks) (ii)**. **1 mark**

Validity/Approach: A registration for a rectangle lacks novelty **(0.5 marks) (iii)** and the ensuing registration will be invalid **(0.5 marks) (iv)**. It will not be possible to convert selected disclaimed lines into solid lines after filing **(0.5 marks) (v)** nor will it be possible to file divisional applications **(0.5 marks) (vi)** to anything not depicted in the parent application. It is unlikely the US description can be relied on for converting the drawings **(0.5 marks) (vii)** because at least at the EUIPO the description is non-limiting **(0.5 marks) (viii)**. Advise the US associate you need to file specific designs directed to the 3 embodiments **(0.5 marks) (ix)** for which you require new drawings **(0.5 marks) (x)** available on the filing date **(0.5 marks) (xi)**. Advise the US associate that the new variants are prima facie not entitled to priority **(0.5 marks) (xii)**. However, there is a grace period of 12 months for own disclosures **(0.5 marks) (xiii)** and so a registration filed within the grace period would not be prejudiced by the market research publication **(0.5 marks) (xiv)**. Advise the client to file as soon as possible **(0.5 marks) (xv)** to reduce the vulnerability to independent third-party disclosures **(0.5 marks) (xvi)**. **7 marks**

Cost reduction: Advise filing a multiple application **(0.5 marks) (xvii)** which will reduce filing costs **(0.5 marks) (xviii)** and is possible because all designs belong to the same class (doors) **(0.5 marks) (xix)**. For a multiple application the applicant must be the same **(0.5 marks) (xx)** and all design variants must be filed on the same date **(0.5 marks) (xxi)**. Each design registration can be handled as an individual right **(0.5 marks) (xxii)**. **3 marks**

Coverage for EU + Norway: Norway is not an EU member **(0.5 marks) (xxiii)**. One option to cover both jurisdictions is to file directly, a CRD at the EUIPO for the EU **(0.5 marks) (xxiv)** and to instruct a local attorney in Norway **(0.5 marks) (xxv)**. Another option to cover Norway, is to file a Hague design registration **(0.5 marks) (xxvi)** which you can handle **(0.5 marks) (xvii)**, designating both the EU and Norway **(0.5 marks) (xxviii)**. Need to check applicant is entitled to use the Hague system **(0.5 marks) (xxix)**. Assuming that a US applicant means a US national or party having a US domicile, the applicant is entitled to use the Hague system **(0.5 marks) (xxx)**. **4 marks**

Deferment: The registration will in the absence of objections publish within weeks after filing / soon / likely before May 2020 **(0.5 marks) (xxxi)** disclosing all designs **(0.5 marks) (xxxii)**. EUIPO/Hague/NO applications offer deferred publication **(0.5 marks) (xxxiii)** (each) for terms long enough, if filed on 8 November 2019, to prevent publication until at least 8 May 2020 / for up to 30 months in the EU **(0.5 marks) (xxxiv)**. Advise the client that you can request deferment **(0.5 marks) (xxxv)** which must be done on filing / cannot be requested after filing **(0.5 marks) (xxxvi)**. With deferred status, publication can be requested later when desired **(0.5 marks) (xxxvii)** for selected designs only **(0.5 marks) (xxxviii)** and so the client can prevent publication of other designs via the design register **(0.5 marks) (xxxix)** by not requesting publication. Unpublished designs will, however, lapse **(0.5 marks) (xxxx)**. **5 marks**

**Total: 20 marks**



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**Question 8**

**In answering the questions below, ignore trade marks and passing off.**

The Managing Director of WatchIt, a manufacturer of distinctive watches, contacts you furiously. A copy of WatchIt's recent "Goldface" timepiece has appeared on an internet outlet. Goldface's dial is appealing because it has a generic shape seen in many watches but a distinctive dial surface print designed by WatchIt's employees. WatchIt launched this product 10 months ago in the UK and it is a commercial success, but WatchIt had no time yet to register its design. You compare the online images of the outlet and indeed their product images are identical to Goldface. The images even show the same surface decoration and composition elements that one of their employees created, such as shadow patterns and an impossible time (where the position of the minute hand does not correspond with the position of the hour hand). You arrange a trap purchase and you are told the item will arrive in 3 weeks from abroad.

- a) Advise WatchIt what unregistered rights it owns to stop sales by the outlet.**  
**10 marks**
- b) Advise if WatchIt can still register its design.**  
**3 marks**

Reviewing the outlet's webpage in more detail, you notice several poor reviews indicating that the watch "looks nothing like the photograph and has not even got the dial surface decoration" and one reviewer complains this is "a cheap fake – I'm embarrassed to be seen with it".

- c) Explain how this information affects WatchIt's options and whether anything can be done to stop the promotion of WatchIt's watches by the outlet.**  
**7 marks**  
**Total: 20 marks**

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Answer

- a) UK UDR: It seems that no UDR subsists **(0.5 marks) (i)** because the dial is known from many watches and therefore commonplace **(0.5 marks) (ii)** and because the only distinctive feature is surface decoration not attracting UDR **(0.5 marks) (iii)**.

EU CUD: CUD may subsist inter alia in ornamentation **(0.5 marks) (iv)** and may therefore subsist in the dial surface print design **(0.5 marks) (v)**. CUD is unlikely to subsist in features of generic shape **(0.5 marks) (vi)** if these do not impart individual character **(0.5 marks) (vii)**. CUD is likely to subsist since the launch 10 months ago in the UK **(0.5 marks) (viii)** which is when the product would have become known to the sector concerned / available to the public **(0.5 marks) (ix)**. CUD subsists for a maximum of 3 years **(0.5 marks) (x)** and so is still available **(0.5 marks) (xi)**.

Copyright: The image of the product appears to be an original work **(0.5 marks) (xii)** due to the composition elements **(0.5 marks) (xiii)** and so would have copyright independent of artistic quality **(0.5 marks) (xiv)**. Likewise, copyright subsists in the dial surface print **(0.5 marks) (xv)**. CDPA 12: Copyright duration is end of life plus 70 years **(0.5 marks) (xix)**, and as the dial and the images (artistic works) were only created recently this still subsists **(0.5 marks) (xx)**.

WatchIt seems to own the above rights **(0.5 marks) (xvi)** by virtue of employment **(0.5 marks) (xvii)** but check to reassure yourself **(0.5 marks) (xviii)**.

**10 marks**

- b) Improving position: Goldface was launched 10 months ago which is within the grace period for own disclosures **(1 mark) (xxi)** and so a UK/EU design can be registered **(1 mark) (xxii)**. Advise WatchIt to register a design as soon as possible and at the latest 12 months from the first disclosure **(1 mark) (xxiii)**.

**3 marks**

- c) If the actual product does not look like the photograph then it is questionable if the product is a copy **(0.5 marks) (xxiv)** but we need to await receipt of the trap purchase to make our own assessment **(0.5 marks) (xxv)**. Provided the product, or a part of it, is a copy, there may be infringement of the CUD **(0.5 marks) (xxvi)** or of the copyright in the dial **(0.5 marks) (xxvii)**. Otherwise, design right/copyright may not actually be infringed by the product **(0.5 marks) (xxviii)** and in that case design right/copyright cannot be used to take action **(0.5 marks) (xxix)**.

Regardless of the product, the image used on the website is a copy **(0.5 marks) (xxx)** as the whole or a substantial part has been reproduced **(0.5 marks) (xxxi)** and is used as an offer for sale **(0.5 marks) (xxxii)**. CDPA 2: Copyright owner has exclusive right to do restricted acts **(0.5 marks) (xxxiii)** which includes issuing copies to the public **(0.5 marks) (xxxiv)**. CDPA 16: Copying a protected work is an infringement **(0.5 marks) (xxxv)**. It seems the image is effective to entice sales as purchases have been made **(0.5 marks) (xxxvi)** and so removal of the image would block this **(0.5 marks) (xxxvii)**.

**7 marks**

**Total: 20 marks**

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**Question 9**

A journal editor approaches you, asking for an article highlighting the advantages of registered designs over unregistered rights in the EU and in the UK.

- a) Write notes in preparation for a meeting listing benefits of registered rights over unregistered rights.**

**6 marks**

During the meeting, the journal editor advises you of a high-profile case that she is going to comment on and she asks you to set out remedies that are likely to be available to the parties.

- b) Advise on remedies available for infringement of CRDs, as set out in Art. 89 CDR.**

**8 marks**

- c) Advise on relief available for infringement of registered designs, as set out in the RDA.**

**6 marks**

**Total: 20 marks**

**Answer**

- a) A maximum of 6 marks is available for reasonable advantages of registered designs over unregistered designs and/or disadvantages of unregistered designs, for example:
- Term of up to 25 years vs 3 year (CUD) or 10/15 years (UDR) **(1 mark) (i)**;
  - Registrations provide a monopoly; infringement does not require copying **(1 mark) (ii)**;
  - Clear start of term (filing date) **(1 mark) (iii)**;
  - Option to extend protection abroad via a Convention filing **(1 mark) (iv)**;
  - Option to mark goods as registered **(1 mark) (v)**;
  - Deferment provides option to register design without disclosure **(1 mark) (vi)**;
  - No qualification requirement/Any legal person can file/own a registration **(1 mark) (vii)**;
  - [Any other reasonable answer] **(1 mark each) (viii)**.

**Maximum of 6 marks**

- b) CDR Art. 89: (a) an order/injunction prohibiting the defendant from proceeding with the acts which have infringed or would infringe the Community design **(1 mark) (ix)**;
- (b) an order to seize/deliver up the infringing products **(1 mark) (x)**;
- (c) an order to seize/deliver up materials and implements predominantly used in order to manufacture the infringing goods **(1 mark) (xi)**, if their owner knew the effect for which such use was intended **(1 mark) (xii)** or if such effect would have been obvious in the circumstances **(1 mark) (xiii)**;
- (d) any order imposing other sanctions **(1 mark) (xiv)** appropriate under the circumstances which are provided by the law of the Member State **(1 mark) (xv)** in which the acts of infringement or threatened infringement are committed, including its private international law **(1 mark) (xvi)**.

**8 marks**

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- c) RDA s.24A: In an action for infringement all such relief by way of damages **(1 mark) (xvii)**, injunctions **(1 mark) (xviii)**, accounts **(1 mark) (xix)** or otherwise is available to him as is available in respect of any other property right **(1 mark) (xx)**.  
RDA s.24C: Order for delivery up/seizure **(1 mark) (xxi)**.  
RDA s.24D: Order for disposal/destruction **(1 mark) (xxii)**.

**6 marks  
Total: 20 marks**