

# Foundation Certificate

## FC4 Design and Copyright Law

Wednesday 16 October 2019 14:00 to 17:00

### INSTRUCTIONS TO CANDIDATES

1. You should attempt **all** questions in Part A and any **three** questions in Part B.
2. The marks for each question in Part A are shown next to the question. Each question in Part B carries **20** marks.
3. If more than the required three questions are answered in Part B, only the first three presented will be marked.
4. The total number of marks available for this paper is 100.
5. Start each question (but not each part of each question) on a new sheet of paper.
6. Enter the question number in the appropriate box at the top of each sheet of paper.
7. Do not state your name anywhere in the answers.
8. Write clearly, as examiners cannot award marks to answer scripts that cannot be read.
9. The scripts will be photocopied for marking purposes.
  - a) Use only **black ink**.
  - b) Write on one side of the paper only.
  - c) Write within the printed margins.
  - d) Do not use highlighter pens on your answer script.
10. Instructions on what to do at the end of the examination are on the Candidate Cover Sheet.
11. Any candidate script removed from the examination room will not be marked.
12. This question paper consists of **seven sheets**, including this sheet.

**In this question paper 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**

### **Question 2**

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

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

**3 marks**

### 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**

**PART A Total: 40 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**

## 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.**

**Total: 20 marks**

## 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**

### **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**