

Draft examiners' remarks D & C 2013

General: Candidates must accept and work with what is stated to be a matter of fact. For example, having been told in Q 5 that the design was “revolutionary”, this should be accepted and the matter taken from there, while having been told in Q 7 that there is clear infringement, there is little point discussing whether there actually is, or has been an infringement. Apart from other considerations this wastes the candidate's precious time.

Q1. This is a fairly standard question which was well answered by most. The most common failing was forgetting in 1a) ii) that UK copyright and UDR terms run from the end of the year containing the triggering event. Marks were lost for failing to give reasons for dates, where necessary, see, here, the instruction to candidates 3f) and, in particular, for failing in 1c)i) to give fully the reason for the start date of CUDR. Some failed, in 1f), to point out that the household article was evidently not an artistic article.

Q2. This was also well answered by most. Faults were mainly in failing to specify in b) that the filing date shifts to the day when all deficiencies are rectified, and in c) that the application was a nullity and would not found a priority claim. Candidates caused trouble for themselves if they did not distinguish between the period during which priority right exists (6 months from first application), and the period allowed within a later application for claiming that right (up to 1 month from filing). In g) deferment is normally 30 months from filing or priority.

Q3. Candidates were less well acquainted with UK procedure, and some guesswork was evident. Most problems were with f), g) and h). Deferment of publication is achieved at the time of filing by not giving permission to publish (R4(3),9(3)). Then permission is given by filing form DF2C and paying the relevant fee on that form. The application must be in order for registration by 12 months from the date the application was made or deemed to have been made, but ignoring any convention priority.

Q4. The question clearly required an explanation, in simple language, of the various possibilities. Those Candidates who merely “regurgitated” the statute did not score as well as they should have, since they did not properly answer the question. Those who failed to notice that they were to write a letter did not give a good impression.

The question was not explicitly limited in geographical scope but as the syllabus is concerned only with UK and EC rights only these were to be dealt with. The commencement and termination dates of the registered and unregistered rights in the two systems should have been clearly laid out and distinguished. Too many candidates omitted to mention the qualification requirement for UKUDR (the residence and nationality of the enquirer were not given), or wrongly said that there was such a requirement for CUDR or for registered rights. It was a waste of the Candidate's time to warn the enquirer about designs that might be incapable of protection since the question made clear that the design was suitable.

Very few candidates told the client about the 12 month grace period available before filing an application for registered right, or the potential use of a first filing to found priority for other territories.

Q5. This question was, surprisingly unpopular because it is rather straightforward. The only difficulty lay in coming to terms with the allegations, which may have appeared unclear (as indeed they often are when made by lay people). What is "the design" in 1), and what are "such cases" in 2)? A proper consideration of these ambiguities leads to a clear answer.

Both G and H have original designs; both are "revolutionary" and there was no prior contact between them therefore each has UDR. Making to their own designs would not infringe the UDR of the other party because it would not be copying. G is proprietor of his UDR and of his eventual RD. There has been no prior publication of the design so the RD will be valid. (A few candidates appeared to be under the false impression that the existence of UDR of another could be some sort of prior right to a RD). Some candidates noted correctly that the RDA, unlike the CDR, does not provide for third-party rights; but even if it did, H did not make serious preparations, etc. Therefore G's RD will be infringed if H make to either his or their design. The only thing G cannot do is to make to H's design.

Q6. Though some candidates got good marks there were too many examples of forgetfulness or lack of precision. Omitting reference to the "computer generated" aspect of authorship and to the need for designing to be in the "normal course" of an employee's duties if the design is to be property of the employer, were common failings. Very few mentioned the "transmission" or "operation of law" provisions of S2(2) RDA, and nobody at all mentioned that the definition of employment etc in S44 includes a contract of apprenticeship.

Q7. The question required a discussion of innocent infringement and its consequences. As some candidates pointed out, innocence is not a defence. If innocent infringement is shown the defendant is not liable for damages or an account of profits, but is liable for all other sanctions. A full answer required a review of the provisions regarding delivery up or destruction.

Was there innocent infringement? There had to be a discussion. Merely mentioning a number in a brochure is not at all the same as marking the product with both number and words as stated in S 243(1) CDPA. However non-compliance by the proprietor is not conclusive of innocence of the infringer. There was no innocence once the infringer was contacted by the proprietor!

There was a mark for those who mentioned the possibility of interlocutory relief to forestall possible disposal.

Some candidates discussed threats at some length. This did not answer the question and anyway, threats against a manufacturer are not actionable (S 26(2A) RDA).

Q8. Most candidates attempted this and got good marks. Mistakes occurred through confusion between the definition of the “acts” and the nature of the actions so defined (see also Question 10).

Q9. Examination technique (if nothing else) should have alerted or even led candidates to suspect that the answers to “UK v EC” might be different, which of course they are.

UK: UDR requires qualification - no.

RD requires novelty – no (there is no exhibition priority in UK).

EC: UDR qualification not needed, disclosed in EC – yes

RD exhibition priority brings date back to within 12 month grace period – yes, provided filing by 10/1/14 and formalities observed.

So after all, there are rights effective in UK!

Q10. Candidates who lost marks in this question did so through confusion with the definition of “infringing acts” (see also the remarks on Question 8). Those who said in answer to part d) that all other remedies except damages would be available were correct. An account of profits can be ordered; compare the situation with design rights.

Q11. Few candidates tackled this question. Almost all who did said that one multiple application could be filed, but did not then deal with the issue that a multiple application is not available for “ornamentation” *per*

se (A 37(1), second sentence, CDR). The issue also arises that within a multiple the number of designs should be minimized because of the additional fees payable for filing and publication, and possibly for deferment.

There are many good answers; the designs may relate to the restrictor plates as such or to nest-boxes. If the plates alone are to be the subject, novelty could be a problem, since bird outlines and pictures are known in general. One possibility is along the following lines;

1). In a multiple application a single design showing the bird outline in a plate with, for novelty, a central aperture.

2). In the same application, designs showing a range of plates with plain or ghosted edges. (A range is needed because although the relationship aperture/perch is constant, they will together have a changing relationship with the plate as a whole, which is of a single size).

3). Separate single application(s) for the various decorations, shown in position on a box. If only one were to be filed (for the sake of economy), then consider whether that might serve to create the same overall impression for all plates, given the novelty of the concept.

Q12. Well answered. Where marks were dropped it was usually because of incompleteness or imprecision in the “must fit” and “must match” exclusions. Only one candidate remembered the “not recorded” exclusion.