

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

**Question 1**

- a) Explain when, according to *Article 2 'Multiple Application'* CDIR, more than one design may be included in an application for registration of a Community registered design (CRD).  
**1 mark**
- b) Explain whether the situation is the same or different for UK registered designs.  
**1 mark**
- c) Explain what is meant by 'indication of the product' as referred to in Article 2 CDIR.  
**1 mark**
- d) According to Article 3 CDIR, '*Classification and indication of products*', how should the indication of the product be worded and what is its purpose?  
**2 marks**
- e) What is the time limit for providing information identifying the applicant where this has not been specified on filing a CRD, and what effect, if any, does this have on the filing date?  
**2 marks**
- f) Further to (e), what happens if the deficiencies are not remedied on time?  
**1 mark**
- g) What is the time limit for correcting an underpayment of filing fees for a CRD, and what effect, if any, does this have on the filing date?  
**2 marks**
- Total: 10 marks**

**Answer**

**Half marks may be awarded where candidates have not been precise**

- a) According to Article 2 CDIR, you can have several designs in the same application so long as they are within the same Locarno classification (**0.5 marks**). This does not apply to surface decoration (**0.5 marks**).  
**1 mark**
- b) Multiple applications available in the UK (**0.5 marks**). No restriction in UK on Locarno classification (**0.5 marks**), and is independent of surface decoration (0.5).  
**Up to max. 1 mark**
- c) Article 2 CDIR defines the product in which the design is intended to be incorporated or to be applied.  
**1 mark**

**Cont...**

**FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015**

- d) Article 3 CDIR says the indication of product should be worded to clearly indicate the nature of the product, preferably terms that appear in the list of products should be used.  
**1 mark**  
Its purpose is to enable the product to be classified into a single class of the Locarno classification, for search/administrative purposes.  
**1 mark**
- e) Article 10 CDIR: 2 months of receipt of the notification from OHIM. Filing date is changed to the date on which all deficiencies are remedied.  
**2 marks**
- f) Article 10 CDIR: The application is not dealt with as a Community design and any fees paid are refunded.  
**1 mark**
- g) Article 10 CDIR: OHIM will set a time limit (2 months from notification) for paying any missing fees (**1 mark**). The filing date does not depend on this, so is unaffected (1 mark). If all fees are not paid, application is rejected (**1 mark**).

**Up to max. 2 marks**

**Total: 10 marks**

**Question 2**

Assuming the following meet the statutory requirements for protection, explain for how long the following rights last, and from when:

- a) Copyright in software in an app for a mobile phone.  
**2 marks**
- b) Community unregistered design right in a chair.  
**1 mark**
- c) UK registered design right for a computer icon.  
**2 marks**
- d) UK unregistered design right for a toy.  
**3 marks**
- e) Copyright in a painting, the creator of which is unknown.  
**2 marks**

**Total: 10 marks**

**Cont...**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

**Answer**

**Half marks may be awarded where candidates have not been precise**

- a) Section 12 CDPA: 70 years  
1 mark  
from the end of the calendar year in which the (last) author of the software dies  
1 mark
- b) Article 11 CDR: Three years from the date on which the design was first made available to the public within the Community.  
1 mark
- c) Section 7 RDA: 5 years from the date of registration (which is the date of filing) initially, up to a maximum of 25 years if renewed every 5 years  
2 marks
- d) Section 216 CDPA: Earlier of 15 years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, or, if articles made to the design are made available for sale or hire within 5 years from the end of that calendar year, ten years from the end of the calendar year in which that first occurred.  
3 marks
- e) Section 12 CDPA: At the end of 70 years from the end of the calendar year in which the painting was painted or, if during that period the painting is made available to the public, at the end of the period of 70 years from the end of the calendar year in which it was first so made available.  
2 marks

**Total: 10 marks**

**Question 3**

Explain, with reasons, whether your client is likely to infringe UK unregistered design right (UDR) by doing the following without the owner's consent:

**In each case, assume UDR validly subsists.**

- a) Photographing a vase and then making identical vases.  
3 marks
- b) Importing into the UK a rare statue by a famous artist for inclusion in a private collection.  
2 marks
- c) Whilst engaged in a licence deal with a third party, manufacturing and selling tea trays in the UK where the third party is the owner of the UDR in the tea trays.  
2 marks
- d) Including a picture of an article, knowing it is covered by UDR, on a social media site as a joke.  
3 marks

**Total: 10 marks**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

Answer

Half marks may be awarded where candidates have not been precise.

- a) Yes – making articles to a design covered by UDR is primary infringement Section 226 CDPA. It doesn't matter whether the copying is direct or indirect and taking a photo may be considered as making a design document recording the design for the purpose of enabling the vases to be made, which is also an infringement  
**3 marks**
- b) No – importing a copy into the UK is secondary infringement, but Section 227 CDPA requires the importation to be for commercial purposes, which putting into a private collection would not be. Importing the original would not be an infringement  
**Up to max 2 marks**
- c) It depends – if the licence (if commenced/in force) permits the client to manufacture and sell the tea trays in the UK. I.e. if client has a licence to manufacture and sell in the UK, then there is no infringement (section 226, 227 CDPA) but it depends on terms of licence  
**2 marks**
- d) No – doing various acts in the course of business, knowing an article is infringing, may be secondary infringement. But posting a picture as a joke is unlikely to be in the course of business, and also probably does not constitute selling, letting for hire, or offering or exposing for sale or hire as specified in Section 227 CDPA  
**3 marks**

**Total: 10 marks**

Question 4

- a) To determine the novelty and individual character of a UK registered design, a comparison must be made with earlier designs. Under what circumstances is a design considered to have been made available to the public according to *Section 1B 'Requirement of novelty and individual character'* RDA, and what exclusions apply?  
**7 marks**
- b) Explain the basic requirements for claiming priority from an earlier application for registration of a UK design or designs. There is no need to discuss formal application requirements.

**3 marks**

**Total: 10 marks**

Cont...

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

**Answer**

**Half marks may be awarded where candidates have not been precise**

- a) Section 1B RDA: A design is considered to be made available to the public if:
- a. it has been published (following registration or otherwise), exhibited, used in trade or otherwise disclosed before the filing/priority date, unless:
    - i. It could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the European Economic Area and specialising in the sector concerned; **1 mark**
    - ii. It was made available to a person other than the designer, or any successor in title of his, under conditions of confidentiality (whether express or implied); **1 mark**
    - iii. it was made by the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date; **1 mark**
    - iv. it was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date in consequence of information provided or other action taken by the designer or any successor in title of his; or **2 marks**
    - v. it was made during the period of 12 months immediately preceding the relevant date as a consequence of an abuse in relation to the designer or any successor in title of his. **1 mark**
- b) Section 14 RDA: The earlier/earliest application must have been filed in a Paris convention/WTO country (1 mark), by the same applicant, his successor in title/assignee or personal representative (0.5 marks), within the 6 months preceding the filing date of the UK application (1 mark), and in respect of the same design(s) (0.5 marks).

**3 marks**

**Total: 10 marks**

**Cont...**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

**Question 5**

Your client has contacted you for details on infringement of unregistered design rights in both the UK and the European Union.

- a) **Explain what acts constitute primary and secondary infringement of UK unregistered design right.**  
6 marks
- b) **Explain what acts constitute infringement of Community unregistered design right.**  
3 marks
- c) **For Community unregistered design right, when is contested use of a design deemed not to result from copying?**  
1 mark

**Total: 10 marks**

**Answer**

**Half marks may be awarded where candidates have not been precise**

- a) i) Primary infringement – Section 226 CDPA:  
UDR owner has exclusive right to reproduce (i.e. copy) for commercial purposes, and infringement occurs if another person, without licence of UDR owner, does or authorises
- the making of an article to that design, i.e. copying the design to produce articles exactly or substantially to that design, or
  - the making of a design document recording the design for the purpose of enabling such articles to be made.
- 3 marks**
- ii) Secondary infringement – Section 227 CDPA:  
UDR is also infringed by a person who, without licence of the UDR holder,
- o Imports into UK for commercial purposes, has in possession for commercial purposes, or sells, lets for hire, or offers or exposes for sale or hire, in the course of a business, an article which is, and which he knows or has reason to believe is, an infringing article.
- 3 marks**
- b) Article 19 CDR:  
CUD owner has exclusive right to use design and prevent any third party not having his consent from using it. Use covers, in particular:
- Making, offering, putting on market, importing, exporting, using a product in which design is incorporated or to which design is applied, or stocking such a product for those purposes
    - o ...if the contested use arises from copying

**3 marks  
Cont...**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

- c) Article 19 CDR:  
If it results from an independent work of creation of a designer who may reasonably be thought not to be familiar with the design made available to the public by the CUD holder.

1 mark

**Total: 10 marks**

**Question 6**

- a) When and by whom can a Community registered design (CRD) be surrendered?  
1 mark
- b) From when does the surrender of a CRD apply and with what effect?  
2 marks
- c) Explain the effect of a request for surrender of a multiple CRD.  
1 mark
- d) Explain what is meant by 'partial surrender' of a CRD.  
1 mark
- e) When is partial surrender of a CRD allowable? Give an example.  
2 marks
- f) How do the requirements for surrender differ if a licence is registered against the CRD?  
2 marks
- g) If an entitlement action has been brought before a Community design court, what effect does this have on OHIM entering the surrender of a CRD in the official register?  
1 mark

**Total: 10 marks**

**Answer**

**\*Half marks may be awarded where candidates have not been precise.**

- a) Article 51 CDR only applies to registered CRDs, so any time  
0.5 marks  
if requested in writing by the CRD owner  
0.5 marks
- b) Applies from when it is entered on the register.  
1 mark  
For CRD for which publication has been deferred, the CRD is deemed from outset not to have effects specified in the CDR.  
1 mark\*
- c) For a multiple application, the surrender takes effect for each individual design for which surrender is requested.  
1 mark\*

**Cont...**

**FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015**

- d) Partial surrender refers to amendment of a design to remove or disclaim features so the design complies with the requirements for protection. **1 mark**
- e) Where the features removed or disclaimed do not contribute to the novelty or individual character of a Community design (e.g. in invalidity proceedings) **1 mark\***
- For example:
- where the Community design is incorporated in a product that constitutes a component part of a complex product, and the removed or disclaimed features are invisible during normal use of this complex product (A4(2) CDR); or
  - the removed or disclaimed features are dictated by a function or by interconnection purposes (A8(1) and (2) CDR); or
  - where the removed or disclaimed features are so insignificant in view of their size or importance that they are likely to go unnoticed by the informed user.
- 1 mark\* for a reasonable example**
- f) Surrender shall only be entered in the register if the licence holder proves he has informed the licensee of his intention to surrender. **1 mark\***
- Entry shall be made on expiry of the period prescribed by the CDIR (3 months) **1 mark\***
- g) OHIM won't enter surrender in the register without agreement of the claimant for the entitlement action. **1 mark\***

**Total: 10 marks**

**Question 7**

Josie Bloggs contacts you for advice regarding her design. She designs fixtures and fittings for yachts, and a few months ago she went to a boating convention in Greece to show off her new design. She talked to a lot of important people in the industry, and her design was very well received. She is now getting lots of enquiries and wants to understand what rights she has and whether she should do anything else to maximise her protection.

- a) **Make notes for advising Ms Bloggs on what Community design rights she has or may have (assuming the design meets the requirements for being a design and has novelty and individual character).** **7 marks**
- b) **Would the situation be different if she had not publicly displayed her design and had only spoken to people at the convention in confidence?** **2 marks**
- c) **Would your advice change if Josie Bloggs wanted to know what UK rights she has or may have?** **1 mark**

**Total: 10 marks**



**FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015**

**Answer**

**Half marks may be awarded where candidates have not been precise**

a)

i) Article 11 CDR: Convention was a few months ago, so within the last 3 years. Assuming this was the first disclosure she could have CUD.

**1 mark**

ii) For CUD to subsist, design must have been made available to the public within the last 3 years

**1 mark**

as stipulated in Article 11 CDR:

iii) Greece is in EU, so if that was first disclosure that counts. Disclosure in 1 state counts as disclosure, if also meets the other requirement below.

**1 mark**

iv) Article 11 CDR: Must be made available by being published, exhibited, used or disclosed such that, in the normal course of business, these events could reasonably become known to the circles specialised in the sector concerned operating within the Community.

**1 mark**

v) Yachting would be quite a niche sport, and she talked to lots of important people in the industry. So it sounds like the disclosure would meet these criteria.

**1 mark**

**Cont...**

vi) Article 7 CDR: She can apply to register a Community design within 12 months from public disclosure as discussed above.

**1 mark**

vii) A CRD offers stronger protection, as she would not need to prove copying in the event of an alleged infringement, and it lasts longer, so it is recommended that she file for registered protection as well.

**1 mark**

b) Yes - Article 7 CDR: Disclosure not counted if design not made available to public. So CUD may not have come into being from the date of the convention, and she may have longer to file a CRD.

**2 marks**

c) Yes - Section 216 CDPA: UK UDR only subsists when design recorded in a design document or model, and we don't know exactly when that happened. Term of protection is also longer.

**1 mark**

**Total: 10 marks**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

**Question 8**

Over the summer your client designed a jewellery box which, on the outside, looks like a thatched cottage, even having painted roses climbing the walls. The front opens up and, on the inside, small 'cupboards' and 'drawers' are provided for storing items of jewellery.

- a) **Assuming that no similar design currently exists, for each of the following discuss what UK unregistered design rights (UDR) and Community unregistered design rights (CUD), if any, might subsist and why:**
- i) **The overall configuration of the whole cottage;** **2 marks**
  - ii) **The chimney of the cottage;** **2 marks**
  - iii) **The painted roses;** **2 marks**
  - iv) **The drawers and cupboards.** **2 marks**

Your client tells you he heard that CUD protection is not available for parts of a design not visible in normal use and that he is concerned that parts of his design may not be protectable.

- b) **Briefly explain to him whether this is true and whether it applies to any parts of his design.** **2 marks**

**Total: 10 marks**

Cont...

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

Answer

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a)

UK UDR Section 213 CDPA:

- i. Yes, e.g. in overall shape and features: definition of design includes design of the shape or configuration (whether internal or external) of the whole article  
**1 mark**
- ii. No. 'Parts of a part' are excluded so no UDR (removal of text after IP Act 2014)  
**1 mark**
- iii. No. Surface decoration excluded so no UDR  
**1 mark**
- iv. Yes/maybe. These are separate parts so there may be UDR in appearance of these features (subject to must fit/must match exclusions)  
**1 mark**

EU CUD Article 3, 4:

- i. Yes. Definition of design includes appearance of the whole of product resulting from inter alia the contours, shape, texture and/or materials of the product itself  
**1 mark**
  - ii. No. 'Parts of a part' are excluded so no CUD  
**1 mark**
  - iii. Yes. Surface decoration not excluded so may be CUD  
**1 mark**
  - iv. Yes/maybe. These are separate parts so there may be CUD in appearance of these features (subject to must match exclusion)  
**1 mark**
- b) Article 3, 4 CDR: This exclusion only applies to complex products composed of multiple components which can be replaced permitting assembly and reassembly. The components such as the drawers and cupboards are unlikely to fall within this definition and so this exclusion does not apply in this scenario.  
**2 marks**

**Total: 10 marks**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

**Question 9**

You receive a query from Susan, who makes and sells garden furniture with another person Steve. Together they designed a picnic bench suitable for large numbers of people. It's basically a large ring shape, and people can sit around both the outside and inside of the ring on benches that fold down from each side. They have a UK design registration in their names that covers their product. You are told Susan and Steve have not been getting on too well recently, as Susan found out Steve had been making plans to sell furniture to their design himself to make some extra money.

- a) **Explain whether or not Steve is allowed to sell the products himself, without consulting Susan.** **3 marks**
- b) **Explain whether or not Steve can sell his part of the registration to someone else.** **4 marks**
- c) **Explain whether or not Susan can license use of the design to someone else.** **3 marks**

**Total: 10 marks**

**Answer**

**Half marks may be awarded where candidates have not been precise.**

- a) Section 2 RDA: both Susan and Steve appear to be joint authors/creators and rightful owners of the UK registered design **1 mark**
- Section 7 RDA: The registered proprietor has the exclusive right to use the design and any design which does not produce a different overall impression on an informed user **1 mark**
- The Act does not say anything about the rights of joint proprietors; both people are registered proprietors so presumably both can exercise rights in the design. Is there any agreement between them? **1 mark**
- b) Sections 15A,B RDA: RDR is personal property and can be assigned **1 mark**
- Assignment is subject to any other rights vested in anyone – do they have any contracts/agreement between them that specifies who can do what? **1 mark**
- Assignment document is only effective if in writing signed by or on behalf of the assignor. Section 15B(2) RDA refers to transmission of a registered design being subject to any rights vested in any other person of which notice is entered in the register of designs, which may include the other owner so it might not be possible for

**FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015**

one joint owner to assign their share without permission of the other, but it's not entirely clear

**2 marks**

[marks may be awarded instead for other sensible comments up to the maximum 2 available here]

- c) Section 15B RDA: the proprietor may grant a licence to use the registered design

**1 mark**

There is no mention of rights of co-owners in this regard, so perhaps there is more scope for one owner to licence use of the design

**1 mark**

but again this would be subject to any other agreements in place between them

**1 mark**

**Total: 10 marks**

**Question 10**

Your client tells you he has developed a new technique for use in the assembly of flat-packed houses. The assembly includes a collection of panels. The edges of each panel have male and/or female connectors configured to lock the panels together. Effectively, the same panel is used for everything, but on differing scales, to create a structure with walls, floors, ceilings, and door and window spaces, etc. Your client also tells you that the panels need to be assembled together in a correct order.

**Make notes on what UK national unregistered rights may be available to him. Ignore trade marks. There is no need to discuss ownership/entitlement of the rights.**

**Total: 10 marks**

**Answer**

**Maximum 5 marks available for 'copyright', and 5 for 'UDR'. Marks awarded for answers up to the maximum 5 marks in each case. Half marks may be awarded where candidates have not been precise. Knowledge of section numbers is not required.**

**a) Copyright:**

i) May subsist in the finished building as a whole, parts of the building and/or each panel because:

**1 mark**

ii) subsists in original artistic works if qualification requirements are met (Section 1 CDPA)

**1 mark**

iii) 'artistic work' includes a work of architecture being a building (Section 4 CDPA)

**1 mark**

iv) according to Section 4 CDPA, 'building' includes part of a building or a fixed structure, so would include the individual panels

**1 mark**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

- v) Would subsist in any plans/instructions/manual when prepared (Section 1 CDPA – literary works; Section 3 CDPA – only subsists when recorded) 1 mark
- Cont...**

b) UDR:

- i) May subsist in the finished building or the panels: S213 CDPA – whole or part of an article 1 mark
- ii) only when recorded in design doc or model 1 mark
- iii) must meet qualification requirements 1 mark
- iv) No UDR in the interlocking features (because are part of a part; also must-fit exclusion s213(3) CDPA) 1 mark
- v) No UDR in the assembly method because a method of principle or method of construction is excluded from protection 1 mark

**Total: 10 marks**

**Question 11**

You receive the following enquiry:

'I own a shop and am always on the lookout for new stock, or new ideas for things to sell. Last Christmas whilst shopping for a present for my daughter, I noticed that one of the toys I was looking for was extremely popular and attracting a good profit no doubt. As such I decided to commission my own version to be made, cheaply, but as close to the original as possible, as I thought this would be a good earner. Yesterday, I received a letter from a solicitor telling me that I am infringing a UK registered design, asking me to do various things. Can you please let me know if I have done anything wrong, what risks I now face, and advise me what my options are?'

**Make notes that would form the basis of a response, giving reasons where appropriate. Restrict your answer to discussion of UK registered designs.**

**Total: 10 marks**

**Answer**

**\*Half marks may be awarded where candidates have not been precise.**

a) What has he done wrong?

**FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015**

i) It is an infringement to do anything that would be the exclusive right of the owner of a registered design (Sections 7 & 7A RDA) so if he sells products to the design as registered, and the registration is valid, there could be infringement

**2 marks\***

ii) Applies if the later design does not produce on the informed user a different overall impression than that of the registered design

**1 mark\***

iii) Depends on degree of freedom of designer

**0.5 marks**

iv) Enquirer is presumably selling the toys in the UK which corresponds to offering or putting on the market in Section 7 RDA, stocking, and he may be importing them – where is the commissioned party based?

**1.5 marks\***

**b) What risks does he face?**

i) Section 24A RDA: Remedies available to UK registered design owner: Damages, injunctions, accounts or otherwise (Section 24C RDA: order for delivery up, Section 24D RDA: order as to disposal of infringing articles), so owner could ask for any of these

**1 marks\***

ii) Section 24B RDA: Subject to the exemption for innocent infringer from liability

**1 marks\***

**c) Options available 3 marks available from the following**

i) Investigate if registration is valid. If not valid, can be no infringement. If there appear to be grounds for invalidity – seek official invalidation by making an application to the UKIPO

**1 mark\***

ii) If there are differences, seek declaration of non-infringement

**1 mark\***

iii) Check registration is still in force – how old it is/have any renewal fees due been paid?

**1 mark\***

iv) Stop selling/negotiate?

**1 mark\***

**Total: 10 marks**

FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015

**Question 12**

Your client Martha tells you that her friend Harold developed a piece of software. Martha has always been interested in the software and, when its development was complete, Martha paid Harold some money in return for a CD containing the software. Martha later realised that the code would be more useful to her in a different form and has modified it and translated it into a different programming language. She has now started selling her modified version of the software via a large online retailer. Harold found out and is complaining that this is an infringement of his copyright.

**Make notes, giving reasons, and including any questions you need to ask, to advise Martha on:**

- a) **the likelihood that she has infringed Harold’s copyright;** **6 marks**
- b) **whether there is any infringement of Harold’s copyright by anyone else buying and reselling Martha’s amended software; and** **3 marks**
- c) **give an example of what she could do to improve her situation.** **1 mark**

**Total: 10 marks**

**Answer**

**Half marks may be awarded where candidates have not been precise.**

- a)
  - i) Section 16 CDPA: Yes, Martha may infringe copyright by copying the software or making an adaptation of the software or issuing copies to the public **1 mark**
  - ii) This applies unless the copyright owner licenses or authorises a person to do so. Was it purchased on terms which, expressly or impliedly or by virtue of any rule of law, allowed your client to copy or adapt it? It’s not clear if it was a private or one-off purchase or if the software is generally available. The latter is more likely to come with terms of use that may stipulate this. **2 marks**
  - iii) This applies to copying all of the work or a substantial part of it. How significant are the changes your client has made? Need to find out. **1 mark**
  - iv) Copying refers to reproduction in any material form including electronic means, which applies here. **1 mark**
  - v) The making of an adaptation of the software is a restricted act according to Section 21 CDPA, where ‘adaptation’ in relation to a computer program includes an arrangement or altered version of the program. **1 mark**



**FC4 (D&C) – Design and Copyright Law  
Mark Scheme 2015**

- b)
- i) Section 56 CDPA: Depends on whether there were any terms in place. If there are no express terms on copying, adapting etc. then anything which Martha was allowed to do may also be done without infringement of copyright by a person buying the amended software
- 2 marks**
- ii) But any copy, adaptation or copy of an adaptation made by the purchaser which is not also transferred shall be treated as an infringing copy for all purposes after the transfer.
- 1 mark**
- c)
- A mark for any sensible suggestion such as cross-licensing or talking to his friend.
- 1 mark**

**Total: 10 marks**