

## Introduction

This year's paper followed the usual format for FC papers, with short Part A questions and longer Part B questions.

Overall this paper was answered very well indeed, with candidates achieving much higher scores than in recent years. The pass rate was 85%. The majority of unsuccessful candidates fell a very long way below the required standard.

These high scores can be put down to clearly increased preparation, particularly in relation to Question 11 (the main absolute grounds question) and Question 12 (the main relative grounds question). Furthermore, and possibly as a result of answers being typed this year, candidates marshalled and expressed their thoughts very much more clearly than in previous years.

Despite the high pass rate, many candidates only just evidenced a satisfactory level of competence in their Part B answers. It was consistently good answers to Part A and to Question 12, the Part B relative grounds question, that drove overall scores upwards.

## Questions

### Part A

Question number	Comments on questions
<b>Question 1</b>	This question related to filing dates and priority. As usual, it was a straightforward question to start the exam. Almost all candidates scored well, with the declaration of intent-to-use being the main omission.
<b>Question 2</b>	This question related to Madrid protocol fees. It was impressively well-answered. Few candidates had difficulty in recalling and assigning the correct names to the fee components.
<b>Question 3</b>	This was about distinctiveness of book titles and was the most difficult Part A question. A full answer needed to extend beyond highlighting the risk that a book title might possibly describe the subject matter of a non-fiction book, and address wider issues of distinctiveness.
<b>Question 4</b>	This question was about registration by agents. A majority of candidates knew this provision, although some candidates mistakenly believed that provisions protecting "well known marks" were relevant.

<b>Question 5</b>	This was about the “prior use” defence: Regretfully, only a handful of candidates knew this provision more than superficially.
<b>Question 6</b>	This was about grant of a licence and assignment of the underlying trade mark. This question on formalities was answered reasonably well, with most candidates differentiating between the assignment document and the registration form. Some candidates wrongly thought that the licensee needed to be party to the assignment.
<b>Question 7</b>	Almost every candidate scored top marks recalling the list of infringing acts, with some evidently using acronyms as a tool to aid their memory – clearly a successful strategy.  The one frequent mistake was to suggest the use of a trade mark in “comparative advertising” is an infringement without further qualification.
<b>Question 8</b>	This was about the “own name” defence: Disappointingly, fewer than half the candidates recalled that this defence nowadays is available only to natural persons. Marks could not be awarded for wrong terminology, such “legal persons”.
<b>Question 9</b>	This was a simple exhaustion scenario, which was mostly answered well, but a few candidates mistakenly said that a UK trade mark is (post-Brexit) now effective against imports of products placed on the EU market by the rights owner.
<b>Question 10</b>	This question related to earlier rights in EU opposition proceedings. The majority of candidates were able to answer this question well. This was impressive as it is not straightforwardly expressed within one single article of the EUTMRs.

**Part B**

<b>Question number</b>	<b>Comments on question</b>
<b>Question 11</b>	The main “absolute grounds” question was answered by most candidates. Answers were, overall, just above Pass level.  The main omission was consideration as to whether the signs (and in particular the coating) could identify the goods of one undertaking, and indeed whether a coating would be recognised as a trade mark at all. Both are separate distinctiveness issues to those further particularised by subsections 3(1)(b), (c) and (d)).

	<p>Any question on the registrability of non-conventional marks requires the systematic analysis of (1) representations (2) distinctiveness, (3) exceptions and (4) acquired distinctiveness. Candidates this year were explicitly guided by the question to consider these points. Questions on non-conventional marks have been set for the last few years and so candidates who made use of past papers should have been familiar with the topic.</p>
<b>Question 12</b>	<p>This “relative grounds” question was very straightforward. It was answered very well indeed by almost every candidate, with candidates having learnt and applied the systematic analytical structure used by the tribunals and courts. The few unprepared candidates who did not structure their answers in this standard way failed to gain marks by overlooking entire areas of analysis such as the identification of the “average consumer”.</p> <p>Almost every candidate answered this question, and it by some margin produced the highest-scoring answers in Part B.</p> <p>The main area of weakness for candidates was on “likelihood of confusion” where candidates needed to move beyond discussing “similarity”. Rather, they needed to apply (rather than merely outline) the <i>Canon</i> “see-saw” test, and address the propensity of the average consumer for the goods at issue to be confused.</p> <p>A few candidates wasted time by describing the components and configuration of the graphics in unnecessarily precise detail, almost as if they were drafting patents. Case law teaches, explicitly, that the average consumer does not do this, and so no extra points are available beyond a basic analysis of what the devices look like, what they conceptually represent, and so why they are essentially similar/different.</p>

<p><b>Question 13</b></p>	<p>This question was about enforceability of earlier rights that are not being used.</p> <p>It was a relatively straightforward question, analysing a provision of the Trade Marks Act in depth, alongside equivalent provisions under passing off law, and drawing-in a few related provisions from elsewhere in the Trade Marks Act. Almost every candidate answered this question, although scores were, overall, just above Pass level.</p> <p>Most candidates knew that copyright, design rights and unregistered rights are not subject to a “use” test. But even the best candidates failed to access available marks on the part-question that examined unregistered rights: a lack of use affects not only the existence of goodwill, but also the propensity of a similar sign to mislead, and the prospect of the use of sign causing damage.</p> <p>Candidates are reminded that the relevant “use” provisions for enforceability differ from the “use” provisions for revocation: a significant number of candidates simply did not appreciate this and so could not achieve many marks.</p> <p>As a general rule in answering IP questions, it is vital that candidates learning statutory time periods (e.g. five years) always do so alongside the relevant date(s) they are “anchored” to. (I.e. is it priority, filing, publication or registration? And if so, of which mark?)</p>
<p><b>Question 14</b></p>	<p>There has not been a long passing-off scenario question for a few years, which might have accounted for the fact that far fewer than half of candidates tackled it. Those who did attempted it did so mostly in preference to question 10. Overall candidates averaged just above a Pass level.</p> <p>Some answers were very good, with candidates recognising the key to unlocking this question, namely that this was a case of “reverse” passing off. Reverse passing off is just as applicable to the supply of intangible “goods” such as IP licences as it is to the supply of tangible goods such as conservatories.</p> <p>A significant proportion of candidates gave very poor answers, some wrongly insisting that there must be a physical trade mark applied to goods for passing off to arise (either because they thought that goodwill exists in a trade mark rather than the underlying product or service, or because they thought that</p>

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	customers can only be misled by a sign mistakable for another's trade mark).
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