

FC4 Design and Copyright Law  
FINAL Mark Scheme 2023

**SECTION A**

**Question 1**

In the United Kingdom, who is considered the first owner of the following newly-existing rights:

a) A UK Registered Design (2 marks)

b) Supplementary Unregistered Designs (2 marks)

**Total: 4 marks**

**Answer**

a) In the UK, ownership of a Registered Design created after October 2014 vests in the first instance in the designer, (1 mark)

or their employer. (1 mark)

Note: The law about commissioners changed in 2014 and leaves the rights with the designer.

b) Supplementary Unregistered Designs vest in the designer or their successor in title (1 mark)

Where a design is developed by an employee in the execution of his duties or following instructions given by his employer, the right to the Supplementary Unregistered Design shall vest in the employer, unless otherwise agreed. (1 mark)

**Total: 4 marks**

## Question 2

a) With regard to S. 16 CDPA (“the acts restricted by copyright in a work”), list the exclusive rights of the owner of the copyright in a work.

(6 marks)

b) With regard to S. 226 CDPA (“primary infringement of design right”), list the exclusive rights of a design right owner.

(3 marks)

**Total: 9 marks**

## Answer

a) The owner of the copyright in a work has the exclusive right –

1. to copy the work. (1 mark)
2. to issue copies of the work to the public. (1 mark)
3. to rent or lend the work to the public. (1 mark)
4. to perform, show or play the work in public. (1 mark)
5. to communicate the work to the public. (1 mark)
6. to make an adaptation of the work or do any of the above in relation to an adaptation. (1 mark)

b) The owner of a design right in a design has the exclusive right –

1. to reproduce the design for commercial purposes— (1 mark)
2. by making articles to that design, or (1 mark)
3. by making a design document recording the design for the purpose of enabling such articles to be made. (1 mark)

**Total: 9 marks**

### Question 3

- a) Explain what an “infringing article” is as defined in relation to an Unregistered Design Right. **(4 marks)**
- b) Explain the conditions under which the right in a UK registered design which has expired may be restored, and who may apply for restoration.

**(5 marks)**

**Total: 9 marks**

### Answer

- a) An article is an infringing article if its making into a design was an infringement of design right in the design **(1 mark)**

An article is also an infringing article if—

it has been or is proposed to be imported into the UK

**(1 mark)**

its making to that design in the UK would have been an infringement of design right in the design,

**(1 mark)**

or a breach of an exclusive licence agreement relating to the design.

**(1 mark)**

- b) If during the period of six months immediately following the expiry an application for extension is made and the prescribed renewal fee and any prescribed additional fee is paid, the right shall be treated as if it had never expired,

But where the right in a registered design has expired by reason of a failure to extend, an application for the restoration of the right in the design may be made to the registrar within the prescribed period – an additional 6 months.

**(1 mark)**

The application must demonstrate that the failure to renew the registered design was unintentional.

**(1 mark)**

The applicant must pay a restoration fee in addition to any outstanding renewal fees.

**(1 mark)**

An application may be made by the person who was the registered proprietor of the design **(0.5 mark)** or by any other person who would have been entitled to the right in the design if it had not expired **(0.5 mark)**

Where the design was held by two or more persons jointly, the application may, with the leave of the registrar, be made by one or more of them without joining the others.

**(1 mark)**

**Total: 9 marks**

#### Question 4

- a) Tina had a registered UK design for a toaster, but it expired in 2014. Nevertheless, she still puts her design registration number on the toasters she sells. What is Tina doing wrong, and what consequence her actions might have?

**(2 marks)**

- b) Who may request a cancellation of a UK registered design, and from what date does the cancellation of a UK registered design take effect?

**(2 marks)**

**Total: 4 Marks**

#### Answer

- a) Tina is falsely representing the design sold by her as being registered.

**(1 mark)**

Tina shall be liable on summary conviction to a fine.

**(1 mark)**

- b) The registered proprietor.

**(1 mark)**

A cancellation of registration takes effect from the date of the registrar's decision.

**(1 mark)**

or from such other date as the registrar may direct

**(Alternate 1 mark)**

**Total: 4 Marks**

### Question 5

In relation to a UK unregistered design right in a design created on 5 May 2023, explain whether the following persons would meet the qualification requirements:

- a) A sole designer who lives in China and employed by a Chinese company. **(3 marks)**
- b) A company, employing a French designer, that was formed in accordance with New Zealand law and operating in the UK. **(3 marks)**
- c) An independent Spanish designer (resident in Spain), of a product embodying a qualifying design, the product having been first marketed in the UK by a British company. **(2 marks)**
- Total: 8 marks**

### Answer

- a) qualifies if designer is a qualifying person **(1 mark)**  
an individual must be habitually resident in a qualifying country / the UK, or a country afforded reciprocal protection. **(1 mark)**  
China is not a qualifying country, so no design right applies **(1 mark)**
- b) qualifies if design created in course of employment with a qualifying person **(1 mark)**  
a company would be a body corporate or other body having legal personality, which, for there to be UDR, must be formed under the law of a part of the UK/other qualifying country and carry out substantial business activity. **(1 mark)**  
New Zealand is a qualifying country, and they appear to have business activity in the UK so Unregistered design right would appear to subsist **(1 mark)**
- c) For the first marketing provisions to apply the design cannot qualify for protection by reference to designer or employer **(1 mark)**  
The designer is not a qualifying person. **(1 mark)**  
Spain is not a qualifying country **(alternate 1 mark)**
- Total: 8 marks**

### Question 6

Explain whether the following individuals enjoy a copyright in the UK (assume the work is original, fixed in material form, was created in the UK by a British national, is not obscene, blasphemous or immoral, not created by an employee, and not the subject of a contract concerning ownership):

- a) A model, in a photo of them taken by a photographer. (1 mark)
- b) The legal heir of a deceased painter who died in 1989, in the painting. (1 mark)
- c) A microbiologist who invented a new drug for curing migraines, in the new drug. (1 mark)
- d) The programmer of computer software, in the software. (1 mark)
- e) The publisher of a newspaper, in the arrangement of the newspaper's first page. (1 mark)
- f) A copywriter, in a word they invented. (1 mark)

**Total: 6 marks**

### Answer

- a) No. The photographer is the author. (1 mark)
- b) Yes. A painting is the subject matter of copyright; the right subsists for 70 years after the death of the author. (1 mark)
- c) No. A drug (an invention) is not the subject matter of copyright. (1 mark)
- d) Yes. A computer program is a copyrightable literary work; the programmer is the author. (1 mark)
- e) Yes. The arrangement of a newspaper is a published edition; the publisher is the author of a published edition. (1 mark)
- f) No. An invented (single) word is not copyrightable. (1 mark)

**Total: 6 marks**

**Section A Total: 40 Marks**

## SECTION B

### Question 7

Yasmin Dawood is a famous photographer based in Swansea. Recently, a British retailer, “Nice Photos,” approached Yasmin with an offer – they want to print her famous photo “Swansea at Sunset” as a postcard to be sold to the public. Yasmin is excited about Nice Photo’s proposal and comes to you for advice.

- a) **Prepare a short brief explaining the possible legal options that will enable Yasmin to permit Nice Photos to produce these postcards commercially.**

**(5 marks)**

Unfortunately, negotiations between Yasmin and Nice Photos did not end in an agreement. A few weeks later, as Yasmin was walking down Swansea’s high street, she saw a local gallery displaying her photo “Swansea at Sunset” on one of the gallery walls. She enters the gallery to find out that it was also selling copies of “Swansea at Sunset” for £100 each. The gallery owner tells Yasmin that the photos were legally purchased from an art dealer in Paris a few weeks prior. Yasmin indeed sold 250 copies of the photo to a French art dealer, but she never imagined they would make their way to the British market.

- b) **Advise Yasmin on whether the gallery infringed her copyright.**

**(4 marks)**

- c) **Yasmin also wants to know what remedies might be available to her if the gallery indeed infringed her copyright.**

**(4 marks)**

A few weeks later, while visiting the Swansea Museum of Modern Art, Yasmin discovers that a copy of her photo, which has been legitimately obtained by the Museum, is displayed with emoji stickers that the curator glued to the photo, which she finds dreadful. Moreover, the photo is displayed without her name next to it.

- d) **Advise Yasmin what legal action, if any, she may take against the museum.**

**(7 marks)**

**Total: 20 marks**

### Answer

- a) Yasmin can assign the rights in the photo to the retailer. If she does this, she will transfer all of the copyright in the photo to the retailer.

**(1 mark)**

Yasmin can license the rights to the retailer. This would license the retailer to do any or all of the acts restricted by copyright, including reproducing it as a postcard.

**(1 mark)**

If Yasmin grants the retailer an exclusive licence, then she would not be able to do any or all of the restricted acts herself until the licence had expired.

**(1 mark)**

If Yasmin grants a non-exclusive licence to Nice Photos, she could further licence the works to third parties.

(1 mark)

If Yasmin grants Nice Photos a sole licence, she could do any or all of the restricted acts herself but not license the work elsewhere.

(1 mark)

A joint ownership agreement can also potentially be put in place allowing use by both Yasmin and the retailer.

(alternate 1 mark)

5 marks

- b) Showing a work in public is an infringing act but not for an artistic work. Yasmin's photo is an artistic work. So, there is no infringement here.

(1 mark)

Issuing copies of a work to the public is a restricted act.

(1 mark)

If the gallery was issuing copies without authority that would be an infringement.

(1 mark)

However, distribution of copies in an EEA state of a work previously put into circulation within the same or another EEA state is allowed; and while the UK is no longer an EEA country, the answer still applies (France is an EEA state and Yasmin sold copies to a dealer there, who, seemingly then sold it to the gallery).

(1 mark)

4 marks

- c) Copyright infringement is actionable by the copyright owner, Yasmin, who can seek –  
damages

(1 mark)

an injunction

(1 mark)

accounts

(1 mark)

or otherwise (any example is fine – such as delivery-up, destruction, or seizing copies)

(1 mark)

4 marks

- d) Yasmin – who is the author of the photo – has the right to object to derogatory treatment of her work.

(1 mark)



Exhibiting in public derogatory treatment of an artistic work is an infringement of moral rights.  
(1 mark)

Yasmin's photo is an artistic work.  
(1 mark)

*Treatment* includes alteration / adaptation.  
(1 mark)

The labels are glued to the photo, so this would indicate alteration / adaptation.  
(1 mark)

*Derogatory* includes treatment that is prejudicial to the honour or reputation of the author. Arguably, adding emoji labels to a photo is derogatory (Marks are awarded for any reasonable argument and conclusion).  
(1 mark)

Missing name - Yasmin also has the moral right to be identified as the author of the photo.  
(1 mark)

However, she must have asserted the right.  
(alternate 1 mark)  
maximum 7 marks

Total: 20 marks

## Question 8

Your client, Esther, tells you that she has two registered UK designs. Esther tells you that her first registered UK design is for a candle stick, which she has filed on 5 May 1997. Her second registered design is for a bicycle storage rack, which she has filed on 20 December 2019. Esther mentions to you she has always been careful about renewing her registration.

- a) Esther wishes to renew the registration for both her designs. What will you tell her? (5 marks)**

Esther also tells you that she has seen a company selling what she believes to be an identical bicycle storage rack in the UK.

- b) Advise Esther on the types of activities by a third party that would constitute infringement of her UK design registration. (4 marks)**

Akalemwa is an enthusiastic cyclist and a lecturer at a London university. Akalemwa purchased one of Esther's bicycle storage racks. In his garage at his London home, Akalemwa experiments with Esther's design in an attempt to figure out a way to make the storage rack more compatible with mountain bikes. In addition, in his class, Akalemwa reproduces Esther's design to show his students how it is built, mentioning to them that this was Esther's design. Esther is very upset by this and seeks your advice.

- c) Explain to Esther whether Akalemwa's actions are considered an infringement of her UK Registered Design. (5 marks)**

Rory is a student in Akalemwa's class and owns a cycling shop in Reading. He thinks that Esther's bicycle storage rack design which Akalemwa showed them in class is great, and so he reproduces it and sells the reproduced products in his shop.

- d) Esther asks you whether Rory committed an offence, and if so, what might the consequences for Rory be? (6 marks)**

**Total: 20 marks**

## Answer

- a)** Upon registration, Registered Designs are protected for five years from the date of filing. **(1 mark)**
- Registered Designs can be renewed (in five-year periods) **(1 mark)**
- For up to a maximum of 25 years. **(1 mark)**
- The registration for the bicycle rack can be renewed **(1 mark)**, but the registration for the candle stick has expired **(1 mark)**.

**5 marks**

- b) The making **(0.5 mark)** offering **(0.5 mark)** putting on the market **(0.5 mark)** importing **(0.5 mark)** exporting **(0.5 mark)** or using **(0.5 mark)** of a product in which the design is incorporated or to which it is applied **(0.5 mark)**; or stocking such a product for those purposes **(0.5 mark)**.

**4 marks**

- c) The right in a registered design is not infringed by an act which is done privately and for non-commercial purposes. Akalemwa uses it at home for private purposes.

**(1 mark)**

The right in a registered design is not infringed by an act which done for experimental purposes. Akalemwa is experimenting with the product.

**(1 mark)**

The right in a registered design is not infringed by an act of reproduction for the purposes of making citations or of teaching. So, Akalemwa is not infringing by using it in his class.

**(1 mark)**

provided that Akalemwa's acts are compatible with fair trade practice and do not unduly prejudice the normal exploitation of the design,

**(1 mark)**

and that he mentions Esther as the source – which he did.

**(1 mark)**

**5 marks**

- d) A person commits an offence if in the course of a business, the person intentionally copies a registered design so as to make a product exactly to that design, or with features that differ only in immaterial details from that design,

**(1 mark)**

And the person does so knowing, or having reason to believe, that the design is a registered design,

**(1 mark)**

and without the consent of the registered proprietor of the design.

**(1 mark)**

Rory reproduced Esther's design without Esther's consent. He did so knowing that it was a registered design (or at least he had reason to believe it was) as Akalemwa mentioned in class that this was Esther's design (Marks are awarded for any reasonable argument and conclusion).

**(1 mark)**

A person guilty of an offence under this section is liable—  
on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine or to both.

**(1 mark)**

on summary conviction in England (and Wales or Northern Ireland), to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

**(1 mark)**

**6 marks**

**Total: 20 Marks**

### Question 9

Josh Silver lives in Colchester and works as a teacher at a local school. He recently discovered in his attic an unpublished original manuscript that was co-written in 1946 by a local resident called Hilda Black who died in April 1958, and another unknown author. Josh wants to upload a copy of the manuscript to his webpage.

- a) Advise Josh when is the earliest date that he can legally upload a copy of the manuscript to his website without having to seek a licence.**

**(3 marks)**

Inspired by his discovery, Josh authors an original play, which he calls "A Journey Through Time." He uploads the play to his publicly accessible website. Ben, a local resident prints a hundred copies of "A Journey Through Time," without permission, but then decides that he does not want the copies and places them next to the bin outside his house. Lisa, who walks past Ben's house, sees the copies and takes them to her shop where she sells them for 1GBP each.

- b) Advise Josh on whether he can sue Lisa for infringing his copyright.**

**(3 marks)**

A week later, as Josh picks up a copy of a local newspaper called The Colchester Gazette, he discovers that the Gazette published a very unflattering review of "A Journey Through Time." The review included the line "Josh Silver should stick to his day job," as well as several direct quotes from the play. Josh is upset.

- c) Josh asks you whether there is any defence the Gazette can rely upon? and if such a defence exists, what will the Gazette need to demonstrate to enjoy it?**

**(9 marks)**

Despite the Gazette's review "A Journey Through Time" becomes a huge hit and so Josh decides to write another play. However, due to his busy teaching schedule Josh does not find the time to write at home. Therefore, throughout his workday at Colchester College, at times when he was not teaching in class, he used the staff-room computer to compose a new play he called "Me and the Moonlight."

- d) Discuss whether Josh or Colchester College is entitled to the copyright in the play.**

**(5 marks)**

**Total: 20 Marks**

### Answer:

- a) Copyright expires at the end of the period of 70 years from the end of the calendar year in which the author dies.**

**(1 mark)**

In the case of a work of joint authorship if the identity of one or more of the authors is known and the identity of one or more others is not, as a reference to the death of the last whose identity is known.

**(1 mark)**

As we know that one of the authors, Hilda, died in 1958, the earliest Josh can legally upload a copy is 1 January 2029.

**(1 mark)**  
**3 Marks**

**b)** The copyright in a work is infringed by a person who, without the licence of the copyright owner

(a) possesses in the course of a business,

**(1 mark)**

(b) sells or lets for hire, or offers or exposes for sale or hire,

**(1 mark)**

(c) in the course of a business exhibits in public or distributes,

**(alternate 1 mark)**

an article which is, and which he knows or has reason to believe is, an infringing copy of the work. The question is whether Lisa knew or had reason to believe the copies were infringing (Marks are awarded for any reasonable argument and conclusion).

**(1 mark)**  
**maximum 3 Marks**

**c)** Fair dealing with a work for the purpose of criticism or review of that work does not infringe any copyright in the work,

**(1 mark)**

the publication in the Gazette is a review / criticism of Josh's book.

**(1 mark)**

However, it needs to be accompanied by a sufficient acknowledgement (unless impossible)

**(1 mark)**

It is questionable whether the line "Josh Silver should stick to his day job," can be considered "sufficient" acknowledgment. We do not have further information on whether there was any other acknowledgment (Marks are awarded for any reasonable argument and conclusion).

**(1 mark)**

The dealing must also be fair.

**(1 mark)**

And that the work has been made available to the public – which it has as Josh uploaded it to his publicly available website.

**(1 mark)**

Copyright in a work is also not infringed by the fair dealing of a quotation from the work,

**(1 mark)**

Provided that the extent of the quotation is no more than is required by the specific purpose for which it is used.

**(1 mark)**

Quoting several lines from a play, as is the case here, seems to be reasonable (marks are

awarded for any reasonable conclusion).

**(1 mark)**  
**9 marks**

- d)** The rule is that Josh as the author of a work is the first owner of any copyright in it.

**(1 mark)**

However, where a literary work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work,

**(1 mark)**

Subject to any agreement to the contrary

**(1 mark)**

Josh wrote the book when he was not actively teaching, and it does not seem to part of his regular duties – this could imply that it was not in the course of employment **(1 mark)**. However, he used the College's equipment and wrote it during work hours – and this could indicate that it was in the course of his employment **(1 mark)**. (Marks are awarded for any reasonable argument and conclusion.)

**5 marks**

**Total: 20 Marks**

## Question 10

Your client, Hiroko, tells you that she has recently come up with a new design for a coffee pot with a unique curved handle. She has not yet disclosed the design. Hiroko sends you a sample of her design and says that she wishes to obtain registered design protection in the UK.

- a) Advise Hiroko what features can generally be suitable for registration in the UK; what are the main requirements for a design to be registrable in the UK are; and whether her coffee pot may meet these requirements (you do not need to discuss any exclusions from protection).

(7 marks)

- b) Advise Hiroko what must be included in the application for the registration of her design.

(5 marks)

Hiroko tells you that the USA, China, and Japan, are also important markets for her, and she wants to know what her options for obtaining protection in those countries are.

- c) Explain to Hiroko what options are available for filing later applications covering the USA, China, and Japan are and when should these applications be filed.

(4 marks)

Hiroko is very successful, and has set up a company called Hiroko Home Appliances Ltd. She wants to assign her UK registered design to the new company, in order to attract investors. She would like to know whether she can transfer her UK registered design to the new company.

- d) Advise Hiroko whether she can assign her UK registered design to the company; what is required to transfer the registration; and the significance of these actions.

(4 marks)

**Total 20 marks**

### **Answer:**

- a) Design means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation.

(1 mark)

A design must be Novel. A design is new if no identical design or no design whose features differ only in immaterial details has been made available to the public before the relevant date.

(1 mark)

A design must also have Individual Character. A design has individual character if the overall impression it produces on the informed user (0.5 mark) differs from the overall impression produced on such a user by any design which has been made available to the public before the relevant date (0.5 mark).



In determining the extent to which a design has individual character, the degree of freedom of the author in creating the design shall be taken into consideration.

**(1 mark)**

The coffee pot has a unique curved handle. Therefore, the shape of the coffee pot would meet the definition of a design.

**(0.5 mark)**

The degree of freedom in making the shape of the coffee pot is limited only in that it must function to hold coffee and have space to hold it.

**(0.5 mark)**

Consideration should be given to the potential implications of this with regard to the degree of difference over the prior art that will be required to produce a different overall impression.

**(0.5 mark)**

Hiroko mentions the design is 'unique' suggesting that it is new and produces a different overall impression. Consideration should be given as to who the informed user will likely be (e.g. a barista).

**(0.5 mark)**

Any reasonable conclusion based on the information provided (e.g. that the coffee pot's shape is likely to qualify for registered design protection).

**(1 mark)**

**7 marks**

- b)** An application to register the design shall be made on Form DF2A (no need to mention the form's number).

**(1 mark)**

And shall include the identity of the person making the application.

**(1 mark)**

and either:

include a representation of the design,

**(1 mark)**

or a specimen of the design,

**(1 mark)**

and include the prescribed fee.

**(1 mark)**

The application shall specify the product to which the design is intended to be applied or in which it is intended to be incorporated.

**(alternate 1 mark)**

If the application includes a specimen, its dimensions shall not exceed 29.7cm x 21cm x 1cm (no need to mention the exact figures).

**(alternate 1 mark)**

**maximum 5 marks**

**c)** Hiroko can either:

1) file national applications in the USA, Japan, and China, and/or

**(1 mark)**

2) file a Hague International Design application designating the USA, China, and Japan.

**(1 mark)**

In each case, a priority claim to the first UK filing **(1 mark)** should be made within 6 months of the first UK filing **(1 mark)**.

**4 marks**

**d)** A registered design or an application for a registered design is personal property and transmissible by assignment. An assignment of a registered design is not effective unless it is:

in writing

**(1 mark)**

signed by or on behalf of the assignor.

**(1 mark)**

The assignment should be recorded on the designs register by applying to the registrar and providing proof of the transfer.

**(1 mark)**

The company will not be able to exercise the rights of the proprietor (e.g. to bring infringement proceedings) until the right is assigned and registered. And Hiroko will be unable to do so in respect of acts occurring after that date.

**(1 mark)**

**4 marks**

**Total: 20 marks**

**Section B Total: 60 Marks**