

## Introduction

This paper retained the format used in previous years, with a set of short questions designed to assess learning across the syllabus (generally one question for each area of the syllabus) plus four more-complicated scenarios to analyse. As usual, the latter included one scenario relating to absolute grounds and one relating to relative grounds.

This year, two of the four Part B questions required, in part, the application of passing-off law (one explicitly, and one as an essential element of the “prior user” defence). Hence this important topic could not be avoided.

Candidates overall did very well, with a mean mark of 63% (up from last year) and a top mark of 86%. The overall pass rate was over 87%.

Unfortunately, a significant number of candidates appeared to have entered for the examination before they were sufficiently prepared for it.

## Questions

### Part A

Question number	Comments on questions
<b>Question 1</b>	In essence, this question asks about the respective functions carried out by the three types of body involved in administering the Madrid Protocol system. Most candidates had little difficulty with this question.
<b>Question 2</b>	This was a simple question about raising unregistered rights before the EUIPO. Many candidates managed to recall at least the majority of elements of the test.
<b>Question 3</b>	This question focussed primarily on statements of intended use. Overall, this was the least well-answered question in part A. Some candidates mentioned “bad faith” in general without explicitly mentioning this more immediate problem in obtaining trade mark protection. Better-prepared candidates realised that clients cannot use the Madrid Protocol if they cannot obtain a base registration
<b>Question 4</b>	This was a question about trade mark symbols. Candidates had few difficulties with it, although half-marks were dropped for stating that the “TM” symbol indicated unregistered trade marks only.

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<b>Question 5</b>	This was a question about observations. Unfortunately, many candidates failed to spot that the client's complaint was one of relative grounds, and therefore unsuitable for an observation.
<b>Question 6</b>	This was a question about priority. Unfortunately, many candidates appeared not to know the basic rules of priority and their answers included errors such as using later filings to claim a fresh priority period.
<b>Question 7</b>	This was a question about the renewals. It was not very well answered, with candidates overlooking the need to renew the base registration, the availability of seniority, or that subsequent designations need to be included in the renewal of the international registration.
<b>Question 8</b>	This was a question about transactions. The requirements for assigning a registered trade mark were very well remembered. However, many candidates failed to address the assignment of the unregistered rights.
<b>Question 9</b>	Most candidates scored full marks for this question, which required them to identify the fact that the use here was not in the course of trade.
<b>Question 10</b>	Most candidates scored full marks for this question, which required the application of the <i>Sieckmann</i> test. Stronger candidates appreciated that this scenario was based on the <i>Sieckmann</i> case itself. Weaker candidates applied the concepts of clarity and precision, but not self-containment etc.

**Part B**

<b>Question number</b>	<b>Comments on question</b>
<b>Question 11</b>	<p>Every candidate attempted this year's "absolute grounds" question. It followed (in general) the usual pattern requiring running through sections 1 and 3 of the Trade Marks Act, including the <i>Sieckmann</i> test.</p> <p>However, this year's question did not require any consideration of acquired distinctiveness, other than to say that in the absence of use, this was not a possibility. It was disappointing to see some candidates had written a page or more of what appeared to be</p>

	<p>rote-learnt paragraphs about the topic, which would have eaten into their time without achieving marks.</p> <p>“Certification marks” are not part of the FC5 syllabus, and candidates were not expected to talk about them (and save for one or two of the high-achieving candidates, none did). For full marks, candidates were merely expected to note that the proposal might not meet the fundamental definition of a trade mark in section 1(1) TMA.</p> <p>A number of candidates referred to marks that were “devoid of any distinctive character” in their section 1(1) analysis. This could not be awarded marks as this concept is proper to section 3(2).</p>
<p><b>Question 12</b></p>	<p>This year’s “relative grounds” question was tackled by every candidate, with most achieving almost full marks. This contrasts with marks as low as 5/20 awarded for the least well-prepared answers which generally lacked the basic structure for tackling such problems.</p> <p>Candidates are now generally attributing a “low/medium/high” similarity to the mark and a “low/medium/high” similarity to the goods. Candidates who omit this step before balancing one against the other cannot access available marks.</p> <p>This a key area of trade mark practice, and many weaker candidates achieved high marks on it. Candidates should, however, bear in mind that they need broad capabilities across the whole syllabus.</p>
<p><b>Question 13</b></p>	<p>Most candidates tackled this question. It required consideration of three areas:</p> <ol style="list-style-type: none"> <li>1. the enhanced protection available to “marks with a reputation”;</li> <li>2. the “own-name” defence; and</li> <li>3. passing-off law.</li> </ol> <p>The first of these elements was tackled reasonably well, although it must be stressed that every element of the statutory test (reputation, due cause, etc.) needs to be considered. A disappointing number of candidates considered the “own name” defence. Candidates did reasonably well in their consideration of the scenario under passing-off law, although none directly applied <i>Harrods v Harrodian School</i>, the lead passing-off precedent in this area.</p>

<b>Question 14</b>	<p>This was a basic scenario primarily requiring the application of the “prior user” defence.</p> <p>It was disappointing that this question was very poorly answered. However, it appeared that this question was largely attempted by the weaker candidates, in preference to question 13. Candidates did not present sufficient detail of all the elements required to invoke the defence, and tended to provide only a cursory passing-off analysis.</p>
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